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American Bar Association Journal

APRIL 1955 • *Volume 41* • *Number 4*

This Month's Cover

The subject of the second of our new series of covers is the illustrious Babylonian king Hammurabi (2067-2025 B.C.). The sixth of a dynasty of energetic rulers, Hammurabi established a strong, efficient government at Babylon, making it the capital of an empire that extended to the shores of the Mediterranean. It continued as a political and intellectual center down to the Christian era. One of the important events of his reign was the promulgation of the great code of laws for use throughout the Babylonian Empire. The code was a great step beyond tribal law; there was no blood-feud; no private retribution; judges were made responsible to the king and the subject was allowed to appeal to the king. Hammurabi's code is one of mankind's first efforts to achieve a law of universal application. The drawing is by Charles W. Moser.

April, 1955

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The President's Page

Loyd Wright

▪ Meetings of the House of Delegates are, to me, thrilling experiences. The gathering together of 225 eminent lawyers from the four corners of our great nation for the purpose of considering the problems which face our profession has deep signifiance. I am not unwilling to admit that I am moved by the sight and sound of these leaders of the Bar engaging in debate on the many matters of interest to the profession and the public with which the organized Bar concerns itself.

The Constitution of the American Bar Association makes it clear that no state or local bar association commits itself, by its representation in the House of Delegates, to acceptance of the decisions of that body.

> . . . no action . . . of the House of Delegates . . . shall be construed to bind . . . any State or local Bar Association. . . .

However, representing as they do every shading of political belief, every type of law practice, and every geographical area within the nation, the decisions of the 225 members of the House enjoy a remarkable degree of acceptance and support among the state and local bar associations.

This is as it should be, for the Bar must, if it is to be effective, present a united front on those questions which are basic to the successful performance of its duties in administering our system of justice. A splendid example of the results which unity of action can achieve is afforded by the recent passage by the Congress of legislation increasing federal judicial salaries. The more often the Bar can demonstrate this sort of unity, the stronger will grow its voice and the greater will be its potential for service.

The opportunity for public service by the profession increases each time a committee of Congress solicits the views of our House of Delegates as to proposed federal legislation, as happens quite frequently. Fifty-one members of the Senate and 227 members of the House of Representatives are lawyers. These lawyers are acutely aware of the representative character of the House of Delegates. They know that a majority of the members of the House of Delegates, 121 out of 225 members, sit as the representatives of ninety state and local bar associations and other legal organizations. They assume that when these representatives of every segment of the profession speak, through the House of Delegates, these expressions may be regarded as the judgment of the majority of the legal profession.

Of course, it is inevitable that some individual lawyers and some bar associations will not agree with the decisions reached by the House of Delegates. This is an altogether normal and, in fact, a healthy condition for a profession such as ours. However, once our representatives have discharged their duties as spokesmen for our views as to matters before the House of Delegates, we should all recognize the House's decision for what it is—an expression of the considered judgment of the majority.

Granting that today's majority may become tomorrow's minority, we will do ourselves credit as a profession if those of us who constitute the minority on any given issue exercise care to make it understood in our expressions to the public that our views are those of a minority.

As lawyers we must continually display to the public admirable qualities of self-discipline. We are steeped in a tradition which gives us insight into the advantages which come from minority recognition of majority will. The public expects us to display the same qualities as an organized Bar.

I have quoted above a section of our American Bar Association Constitution which seems to me to create a climate which is not conducive to unity of expression by the organized Bar. If my views are correct, this section will at some future date require amendment. Our object must be the strengthening of the voice of our profession and the increase of its potential for service.

Several matters considered by the House at its February meeting are of such importance as to prompt me to comment on them and to direct your attention to the subsequent pages of this issue of the JOURNAL, where they are set forth in more detail.

Judge Orie Phillips, Chairman of our Special Committee on Disciplinary Procedures, reported that a final draft of the Model Rules of Court for Disciplinary Proceedings was being circulated to state and local bar associations. I urge that all associations give this matter top priority attention. Great credit will be reflected upon the profession if we see to it that these Rules receive serious consideration at this formu-

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American Bar Association Journal

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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the Section of Bar Activities and the Section of Criminal Law are $2.00 a year; dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Insurance Law, the Section of Mineral Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Labor Relations Law and the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East Sixtieth Street, Chicago 37, Illinois.

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

The Status of Forces Agreement—In Reply to Mr. Bowen

■ In Mr. Ivan Bowen's article published in the February issue of the JOURNAL, there is a section entitled "A Minor Offense . . . A Five-Year Sentence", which is inaccurate in many respects. For example, the NATO Status of Forces Agreement does not, as Mr. Bowen states, surrender the constitutional rights of soldiers of the United States serving on foreign soil by subjecting them to the criminal and civil laws of such foreign nation. Inasmuch as the Constitution cannot limit the operation of foreign courts within the territory of a foreign nation, I fail to see how an American citizen in such a country has any "constitutional rights" to surrender.

Mr. Bowen also states that for a minor offense Private Richard Keefe received a five-year sentence from a French court. Private Keefe pleaded guilty and was convicted of a crime best described as highway robbery, during which he and a companion brutally beat and garroted an elderly taxi driver and stole his taxicab. Under the Table of Maximum Punishments of the Uniform Code of Military Justice, the offense of robbery is punishable by confinement at hard labor for ten years. Contrary to what Mr. Bowen states, such a serious offense could not have been tried by a summary court martial. The punishment meted out by the French court was well within the limits established for United States courts martial for such an offense.

Mr. Bowen's article implies that except for the Status of Forces Agreement American servicemen would not have been subject to trial by foreign courts. This is not true. Foreign courts in France and elsewhere *had* tried and *had* confined American servicemen prior to the Status of Forces Agreement. Moreover, a reading of the Status of Forces Agreement will readily reveal that it guarantees protections to which our servicemen in NATO countries might not otherwise be entitled.

C. B. MICKELWAIT
Major General, USA
Office of the Judge Advocate General
Department of the Army
Washington, D. C.

The Status of Our Soldiers Under Foreign Law

■ There is such a slight regard for accuracy in Mr. Bowen's article in the February issue of the JOURNAL that it may be misleading to single out any particular section for comment. However, the first three paragraphs of the section titled "A Minor Offense. . . . A Five-Year Sentence" reflect so many misconceptions that they should not pass unnoticed. They are in error in the following respects:

1. Under Article VII of the NATO Status of Forces Agreement, members of the Armed Forces are not in fact subject to the criminal law of the host state in all cases. The United States authorities exercise primary jurisdiction over all offenses committed by military personnel in the performance of their official duties or against other members of the United States Armed Forces and accompanying civilians.

2. The NATO Status of Forces Agreement surrenders no constitutional rights of American citizens. The United States Constitution does not govern the actions of foreign courts and authorities and limits the application of the law of a sovereign state within its own territory. Furthermore, as the Attorney General of the United States has pointed out, members of the armed forces of a foreign state do not under international law enjoy an absolute immunity from the jurisdiction of the host state for all offenses committed within its territory. If Mr. Bowen believes that American soldiers should not serve outside the United States, where they will necessarily become subject to some degree to foreign law, he should say so.

3. Private Keefe was not a drafted G.I. He enlisted.

4. The offense of which Private Keefe and another enlisted man were found guilty in the case referred to by Mr. Bowen was hardly a minor one. . . .

5. It should be pointed out that Keefe already had six convictions by courts martial. This case would have meant his seventh. Mr. Bowen's solicitude for the man's wife and little children seems somewhat more ardent than that of Private Keefe.

6. Prior to the conclusion of the North Atlantic Treaty and the NATO Status of Forces Agreement, the offense would have been one over which, under both customary international law and our arrangements with France, the French courts could have exercised jurisdiction. . . .

7. It is neither accurate nor fair to the United States forces stationed in foreign countries to say that a deserter who rapes a woman or an absentee who attacks a civilian in the host country "would represent the sovereign power of the United States on foreign soil". Would a French soldier who committed these acts in Minnesota represent the sovereign power of France and be immune from the jurisdiction of the Minnesota courts? . . .

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The rest of Mr. Bowen's article seems on approximately the same level of accuracy. It would take considerable patience to enumerate all the other instances in which he goes astray. If any of your readers are tempted to entertain themselves by compiling such a list, they may derive some amusement from comparing Mr. Bowen's extreme views on state sovereignty with those held by Soviet lawyers and statesmen.

R. R. BAXTER

Cambridge, Massachusetts

The Facts in the Case of Private Keefe

■ Although I am in full sympathy with the opinion so ably expressed by Mr. Ivan Bowen in the February JOURNAL, pages 146 *et seq.*, that world government threatens our Constitution, I feel that his selection of the case of Private Keefe (pages 149 and 177) as a horrible example of the working of the Status of Forces Agreement was unfortunate. The prominent sub-title, "A Minor Offense", and the statement that it would have merited only a summary court martial under American military law, are too much in line with the frequent attitude that almost anything for which a soldier has been severely punished would have been treated as a mere boyish prank in civil life . . .

Our forces are stationed on French soil by consent of the French who, having the right to withhold consent, also have the right to qualify it. France is not a satellite, obliged to receive our troops willy-nilly. Even if we could "throw our weight around" enough to compel complete immunity from local law, doing so would open us to the complaint our forefathers made against George III in the Declaration of Independence: "He has affected to render the Military independent of and superior to the Civil Power"—in this instance the civil power of the French Republic. What would this do to harmonious relations in the anti-Communist world?

In the words of Grover Cleveland, a situation and not a theory confronts us in the disposition of our forces to meet the Red threat. Despite my agreement with Mr. Bowen's thesis, and mindful of the danger of our constitutional rights being whittled away by exceptions, it seems to me that the situation leaves no practical alternative to accepting the judgment of President Eisenhower in giving other countries police power over off-duty offenses of our men stationed therein.

I have been a member of the American Bar Association since 1928, am a retired colonel of the Judge Advocate Reserve, served overseas as an enlisted man in World War I and three years in Africa and Europe in and after World War II.

ROBERT W. WILSON

Tampa, Florida

Some Words of Praise for Judge Palmer's Article

■ The thesis by Judge William J. Palmer in the November and December issues of the AMERICAN BAR ASSOCIATION JOURNAL entitled "The Lawyer and Capitalism" admirably distinguishes between the system of competitive enterprise of capitalist states and the controlled system of economy advocated by communists and socialists.

Judge Palmer's reminder of the natural instincts of human beings for freedom in the exercise of their minds and energies—the dignity of man—is soul-stirring; his exposé of the fallacies of communist dogma and socialist theories is logical and convincing; his warning of danger of loss or impairment of rights existing under open and competitive capitalism is disturbing; his plea to lawyers to exert their influence for the preservation of free and competitive capitalism is a challenge to the common sense, civic responsibility and will to survive of all members of the legal profession.

All lawyers should read this treatise and learn the lesson and heed the warning presented therein.

WILLIAM C. BROOKER

Hillsborough County Court
Tampa, Florida

The Section of Criminal Law

■ Since this is the first letter I have ever written in nearly twenty years of membership in the American Bar Association and during that time an interested reader of the JOURNAL, and an occasional contributor to your book review column, I hope you will indulge me enough to consider a comment I have on what seems to me to be a hardly gracious editorial entitled "The Sentence of the Court". In this editorial you seem to infer that the Section had fallen to a pretty low estate and that this at long last is to be remedied.

Much of my interest since becoming a member of the Association has been devoted to the Section of Criminal Law, and I have done my level best in the Association with others whom you call "outstanding lawyers" to interest people in the work of the Section. Admittedly this has been difficult and discouraging for

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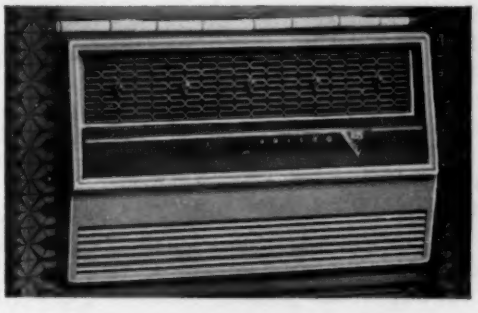

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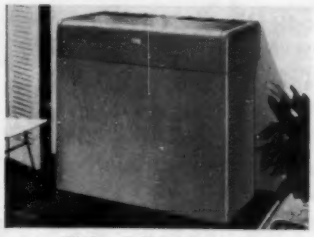

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the reasons you state, but if you will check back I think you will find that, at least so far as public interest is concerned, our meetings and activities have attracted as much comment and interest as any other group in the Association.

The present Chief Justice, as you know, was for many years a Vice Chairman of our Section, attended many of our meetings and presided on several occasions. Other distinguished jurists, including Mr. Justice Jackson, Mr. Justice Clark, Chief Judge Parker and many others, have given generously of their time to the work of the Section. Our meetings, albeit they were frequently banished to some back corner room, have been on the whole well attended. Such speakers as Adlai Stevenson, Senator Donnell, Senator Kefauver, as well as the jurists I have mentioned, have attracted wide attention; and I cannot help but believe brought considerable public approval of the Bar Association because each of these gentlemen pointed up questions that interested the public.

Also, of course, it was our Section that according to Mr. Justice Jackson cradled the Bar Association's present activities in research on criminal justice. We also, I think, can take a large measure of credit for the development and adoption of the Federal Rules of Criminal Procedure, and there have been other activities of equal importance. I, of course, do not like to be thin-skinned about these matters nor do I or any other member of the Section seek any approbation. Certainly there has been no officer of the Section with whom I am acquainted who attempted to use it in order to promote his own aspirations either in the Association or elsewhere. What the Section has done was, we sincerely believe, *pro bono publico* and without an eye to receiving any offices or awards.

I hope, therefore, you will put yourself in the position of Mr. Chief Justice Warren, Judge Justin Miller, Jim Robinson, Arthur Freund, Walter Armstrong or others who have borne the laboring oar and read the editorial again and see if you can understand the basis for at least a modicum of disillusionment.

JAMES V. BENNETT
Federal Bureau of Prisons
Washington, D. C.

[EDITOR'S NOTE: The editorial referred to by Mr. Bennett was intended to be a factual statement. No reflection upon the Section of Criminal Law, or any of its officers or members, was intended.]

Mr. Keeffe Replies to Mr. Breuer

■ With considerable amazement I have read the letter of Ernest Henry Breuer, New York State Law Librarian, which you published in the November issue.

One part of my July book review, to which Mr. Breuer takes exception reads:

> Suppose you are a practicing lawyer at Yuma, Arizona, and you have just been retained in an anti-trust case.... You go to your county law library and consult the librarian. If the county library at Yuma resembles the one in Chemung County, New York, or Hamilton County, Tennessee, the two I know best, you will regretfully be told that there are no books on the subject in the library and the librarian has no books to suggest to you to read.

Now, if Mrs. McCarthy, the county law librarian of Chemung County, or Mrs. Stowers, the county law librarian of Hamilton County, had written to complain of this paragraph, I really would have been embarrassed. No two people have ever been more courteous and helpful to me during the hours I spent in research in their lovely libraries. When I said they "had no books to suggest", I meant not to reflect on these two able, fine women, but to call to the attention of the profession the absence of an adequate catalogue of law books. Until the catalogue of Julius Marke was published, there was no reference work available to which Mrs. McCarthy in Elmira, New York, or Mrs. Stowers in Chattanooga, Tennessee, or Mrs. Spelvin in Yuma, Arizona, could turn to discover what books have been written on anti-trust or any other field.

This is why in my review of Julius Marke's book I said:

> The result [publication of the Marke catalogue] is, whether you are a lawyer in Yuma or Chemung County, New York or Hamilton County, Tennessee, you can have at your finger tips by means of an interlibrary loan in a very short time precisely the best books in the field, to let you impress that new client or spellbind the local Chamber of Commerce as the keynote speaker at the annual clambake.

One of my favorite law librarians who has read Mr. Breuer's letter to the JOURNAL commented:

> Personally I believe that Mr. Breuer failed to see the true significance of your comments in reference to the Library of Chemung County. If Mr. Breuer were really interested in building up his circulation statistics, he should welcome your remarks. Obviously at this point, the New York State Law Library has failed to impress on the Bar of the State the type

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of service it renders for lawyers. Here is a golden opportunity, through the use of the Annotated Catalogue, for a local county Law Library to learn of the existence of books which can then be obtained on inter-library loan from the State Law Library. Mr. Breuer fails to note or observe that the main difficulty of research in a local law library is the failure to ascertain the materials desired or required in pursuit of the solution to a legal problem. The reason that the local lawyer does not call upon the State Library for help is that he does not know what to ask for. If anything, Mr. Breuer should be pleased with the opportunity now presented in the publication of the Annotated Catalogue, for lawyers may now learn of various books which can be borrowed on inter-library loan from the New York State Law Library, assuming the New York State Law Library actually has them in its collection.

Rather than lengthen this letter, I asked my same friend what he thought about Breuer's comments on the part of my review which characterized library index cards as "damnable" to the neck, the back and the brain. He said:

> As to the use of the "damnable card indexes", once again Mr. Breuer fails to see the point. The statement isn't made that the card catalog is not a valuable tool in research. The reference is to its use by the average lawyer which often results in confusion and frustration. Mr. Breuer also fully knows that very few lawyers actually use the card catalog even in his own library unless forced to do so, a situation which will drive them from the library, rather than attract them.

The last person on earth to complain about my review of the Annotated Catalogue of Julius Marke is any state law librarian. Every state law librarian knows that the Marke catalogue is a godsend, as it tells every lawyer, be he in Wall Street or Yuma, thousands of books that no lawyer would ever know were available unless he made a personal trip to a large and complete law library and searched through its card index system. As a result through his office or county law librarian, every lawyer can draw from his state law library any books he wants without leaving his office.

Since as Emerson said, "it is the law of their limbo" that a book "must not speak until spoken to", Julius Marke and Arthur T. Vanderbilt by the annotated catalogue give this profession for the first time an adequate index (of over 120,000 law books) that can and ought to be on the desk of every practicing lawyer in America. Sure, we'll have to look at the supplements Marke is to publish and at current lists for books since 1950, but that is nothing if at one glance we can see all the important law books published on any subject down to 1950.

ARTHUR JOHN KEEFFE
New York, New York

He Agrees with Mr. Stevenson

■ I trust it is not too late to express concurrence in the letter of Mr. J. Paul Stevenson, of Sterling, Kansas, published under the heading, "Views of Our Readers", in the October, 1954, issue of the AMERICAN BAR ASSOCIATION JOURNAL, particularly that part of the letter which advocates polling the members of the Association whenever the governing authorities deem it useful to speak in the name of the Association concerning controversial issues of public policy. I join also in Mr. Stevenson's "grave doubts as to whether the American Bar Association has any business expressing the Association views or taking a stand on issues which are more or less political".

Assuming however, for the sake of the argument, that occasionally such expression is justifiable, I feel very strongly that no group of members however representative, is competent to speak for all the members unless and until the members have been given an opportunity to vote upon the question individually. I have in mind not the American Bar Association only, but also other comparable organizations of which I am or have been a member.

I am convinced, moreover, on the basis of experience that votes of governing boards and of meetings of members where a minority only is present, and no notice of a vote on the question has been given in advance, are far more likely to be unrepresentative, ill-considered and misleading than honestly helpful in the formulation of public policy.

WALLACE MCCLURE
Charlottesville, Virginia

A Federal Trial Examiner Takes Issue with Mr. vom Baur

■ As a member of the Committee on the Administrative Procedure Act of the Administrative Law Section and a federal hearing examiner, I must take exception to some of the statements of Mr. vom Baur in his article, "The Administrative Process", in the January, 1955, issue of the JOURNAL.

Mr. vom Baur says: "it is *common practice* for litigants and their counsel to confer privately with members of administrative agencies and their examiners who are in the process of judging a case, and to approach them in other ways which no judge of the courts vested with judicial

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The Fifth Amendment:

Should a Good Friend Be Abused?

by **John F. O'Conor** · *of the New York Bar (Larchmont)*

▪ Perhaps no subject has been so widely debated in legal circles during the past year as the problem of suspected Communists who invoke the privilege against self-incrimination to block inquiry into their activities. The Journal has carried articles on both sides: Professor Ralph S. Brown (40 A.B.A.J. 404, May, 1954) and Dean Erwin N. Griswold (40 A.B.A.J. 502, June, 1954) have argued that one may be quite innocent of disloyalty and yet feel obliged to invoke the protection of the privilege; Judge Julius J. Hoffman and Sol M. Linowitz, writing in the July issue (40 A.B.A.J. 582 and 588), took a different position. The editors of the Journal believe that Mr. O'Conor's exposition is a valuable addition to the literature on a subject in which, judging from the number of letters we have received, our readers are much interested.

▪ Most thoughtful people probably would not care to see any part of the Fifth Amendment abolished. Still less do they care to see it abused. The principal problem, in the case of the privilege against self-incrimination, is to defend the right without encouraging its abuse.

It is axiomatic that the greatest threat to any right lies in its abuse. Those who would ignore due process usually claim that prescribed judicial procedures are overloaded with cumbersome obstructions to the administration of justice. When freedom of the press is restricted, it is usually on the ground (real or asserted) that the press is being used to spread falsehood.

The right to claim the privilege against self-incrimination, in the course of congressional investigations as well as in judicial proceedings, is sanctioned by long usage and frequent decisions of the United States Supreme Court. Its preservation should not be jeopardized, either by permitting its assertion by those who claim it under admittedly false pretences, or by permitting those who rightfully assert it to deny the obvious consequences of their acts.

It is doubtful whether the privilege against self-incrimination has ever been as much abused as it is currently by those who assert under oath that to state whether or not they are Communists would tend to incriminate them and yet demand that the public accept their statements, not under oath, that they are not Communists. A very practical problem is raised as to whether such abuse is not encouraged by those who would accept such inconsistent statements, permitting those who make them to retain positions for which it is generally recognized that Communists or perjurers are not qualified.

Somewhere not in the center of the controversy over this problem lies the question of whether, under the Smith Act and the Internal Security Act of 1950, membership in the Communist Party is or is not an incriminating fact. If, as the Smith Act provides, it is a crime to advocate the overthrow, by unconstitutional means, of the Government of the United States, why is it not a crime *per se* (and the Internal Security Act says it is not[1]) to be an officer or a member of a Party which the Subversive Activities Control Board has found to advocate such overthrow?

The mere statement of this question seems to indicate its true effect upon the privilege. Any fact, even though not in itself a crime, which may form a link in a chain of evidence necessary to a prosecution for crime, is held to be, within the meaning of the Fifth Amendment, incriminating. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). Therefore an affirmative answer to a question about Communist connections is considered incriminating, and the privilege may be claimed, *whether or not it is a crime to be a Communist. Blau* v. *United States* 340 U.S. 159 (1950); *Rogers* v. *United States*, 340 U.S. 367 (1951).

More central to the controversy is the question whether, by claiming

1. 50 U.S.C. §783(*f*).

that the answer to a given question would incriminate him, a witness necessarily asserts by implication that he has committed a *crime*. Chief Judge Calvert Magruder of the United States Court of Appeals for the First Circuit, states this question succinctly, and gives the answer, in *Maffie* v. *United States*, 209 F. 2d 225, 227-8 (1954):

> Sometimes it is said that one who claims the privilege impales himself on the horns of a dilemma: Either he is obviously a criminal, or else he is a liar and a perjurer in stating under oath that he declines to answer because a truthful answer would incriminate him. Occasionally, but probably infrequently, this may be so. *It depends upon the nature of the question.* (Italics added.)

The real core of the controversy relates, not to whether it is proper to infer that a *crime* has been committed, but to whether it is proper to make *any inference* as to what the correct answer to the question would have been if the privilege had not been claimed. The question can be stated thus: If there are only two possible answers, and only one of them could be incriminating, is it proper to conclude that the incriminating answer is the correct one? Whether the incriminating answer involves a fact which is in itself a crime, or is only a "link in a chain of evidence", is unimportant, and as Judge Magruder states, depends upon the nature of the question.

Judge Magruder gave some concrete examples in the *Maffie* case. Suppose the witness claims the privilege when asked, "Did you kill *X*?" The witness may have committed murder. But it is also possible that he killed *X* in self-defense, or in a non-negligent accident. Both of these possibilities assume, however, that he did kill *X*, and it seems correct to assume that he did so. It is only incorrect to assume that he did so deliberately, without justification. A "Yes" answer in this case may be assumed to be the correct one unless the witness is an executioner, or in some other way had a duty to kill *X*, so that a "No" answer would be incriminating.

Judge Magruder gives another example of a witness who refuses to state whether he has recently secreted a large sum in cash. He states that it should not be assumed that the witness is responsible for recent robberies. It may be that the witness keeps his money in his sock. But unless the witness had some duty to keep his money in his sock, so that *not* to do so would be incriminating, it would seem proper to infer that he had secreted some money. The affirmative answer is the incriminating one.

When the only answer that would tend to incriminate would also reveal the commission of crime, Judge Magruder does not hesitate to state that the commission of the crime may be inferred. Thus he states (209 F. 2d 228):

> Suppose the question is: "Did you pick X's pocket and steal his wallet?". Only a "Yes" answer could be incriminating, and if the witness claims his privilege, the fair inference is that he must be a pickpocket and a thief. That natural inference might be drawn to his detriment in the ordinary affairs of life—for instance, a bank might conclude that such a person could hardly be a good risk for employment as a teller, if he has got himself in such a fix that he cannot answer a question like that. The only place such inference cannot be drawn is at a criminal trial. . . .

Professor Wigmore makes a similar statement[2]. He asserts:

> "Logic is logic," ever since the days of the One-Hoss Shay; and it is on that score impossible to deny that the very claim of the privilege involves a confession of the fact. "Were you assisting the defendant at the time of the affray?"; this may be answered "yes" or "no", if "no", the fact is not criminating and the privilege is not applicable; if "yes", the fact is criminating and the privilege applies. The inference, as a mere matter of logic, is not only possible but inherent, and cannot be denied.

Wigmore cites *Scholl* v. *Bell*, 125 Ky. 750, 796-7, 102 S.W. 248 (1907), as stating the "correct moral attitude toward the privilege"[3] In the *Scholl* case an election was declared null and void because of fraud and violence on the part of the police and others. Part of the passage which Wigmore quotes is as follows:

> Suppose a secret murder had been committed, and the police on that beat, when asked about it, should say, "I decline to answer for fear of incriminating myself". This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him? Suppose a bank had been robbed, and the bookkeeper, the teller, and cashier, when interrogated, should say, "I decline to answer under advice of counsel". What would be thought of a board of directors who would afterwards leave the bank in the hands of such men? This is precisely the situation here. Peace officers, whose duty it was to prevent and expose crime, when called on to do so, sheltered under the rule against self-incrimination; and yet these men still wear the official uniform, still draw salaries from the public purse, and this is made possible only by the consent of those who are the apparent beneficiaries of their silence.

A Reluctant Witness . . . *Communist or Perjurer?*

It seems obvious enough, in the light of the foregoing, that the witness who refuses to state whether or not he is a member of the Communist Party is either a Communist or a perjurer. If, as he asserts under oath, the answer actually would incriminate him, he must be a Communist. If he is not a Communist, the answer would not incriminate him, and he has perjured himself. Similarly, the one who denies that he is now a Communist, but refuses to state whether he ever was in the past, either once was a Communist or is now a perjurer. In either case the only incriminating answer would be to admit the Communist membership. To deny it could not incriminate a witness under any hypothesis.

Let us assume a hypothetical case in the field of education, a Professor *X* who comes from a good midwestern family with a conservative background. From his earliest years

2. 8 Wigmore, Evidence, §2272, pages 409-10 (3d ed. 1940).
3. *Id.* §2251, page 318.

he received the best of character training, and the habit of faithful church attendance. He was very successful in college, did some postgraduate work, and was eventually appointed to the faculty of a large university.

Always interested in public affairs and current social problems, Professor *X* at some point during his studies became interested in Marxism and Communist writings. Later, in good faith, and (it seemed to him) with the highest of motives, he joined the Communist Party. He accepted its program for the overthrow of the Government, by unconstitutional means, if necessary, because he was convinced that this was the only way to bring about what he considered a necessary social program. Following the atheistic doctrine of Communism, he left his church.

In order to explain this man's state of mind, it is necessary to point out that even the worst criminals believe their crimes desirable. No man acts except in a way which he has, at least for the time, determined to be the best way. The criminal's determination may be the result of a distorted state of mind. It may be based on the belief that self-gratification, or the accomplishment of one's own ends, is more important than other considerations. But whatever the reason, the criminal must always determine that the criminal course is best for the criminal. In the case of Professor *X*, who is not necessarily a criminal, at least in the ordinary sense, most of us will agree that his chief error was, like the criminal, to place his own belief of what is good above compliance with Divine and human laws.

Let us assume that during offhours Professor *X* teaches at the Samuel Adams School in Boston, or, perhaps, the Jefferson School of Social Science in New York (both cited as "adjuncts" of the Communist Party by Attorney General Tom Clark). He joins various Communist front organizations. He does not teach Communism or subversive doctrines to his university students, but he does freely express opinions which parallel the party line.

He obviously opposes investigations by congressional committees in the field of Communism. He regards them as threats to civil liberties, and he joins in petitions to that effect. He joins in petitions requesting amnesty for the "victims of the Smith Act", supporting the "right" to teach Marxism in the Samuel Adams and Thomas Jefferson schools, and many other petitions of like tenor.

Both in and out of classes he informs his students of his opinions on international affairs. He considers the Chinese Communists to be "agrarian reformers". He wants recognition of Communist China by the United States and its admission to the United Nations. He favors free trading in munitions and other commodities with Russia and Communist China. He does not say much about Russia, but he is highly critical of the governments of South Korea, Formosa, French Indo-China and Spain. He permits his atheistic beliefs to influence his philosophy when teaching philosophy, his scientific hypotheses when teaching science, and his analysis of events when teaching history. Using his professional status to its fullest extent, he obtains wide publicity for these thoughts through magazine articles and public addresses.

He knows that he cannot be criticized for expressing his views on such matters. Similar positions have been taken at various times by many about whose loyalty and disassociation from Communism there is no question. Some of his views are even shared, and expressed, by the president of the university. He takes full advantage of the fact that to restrain him would tend to hinder freedom of expression by other faculty members, who are not part of his conspiracy.

In all that he does, he never engages in active treason, sabotage or espionage. He does not actively *teach* unconstitutional overthrow of the Government, even secretly at meetings of the Communist Party.

Underhill Studios

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He is, however, motivated by his subservience to Communist discipline. He takes the positions that he does because they are coincident with the Communist Party line, which he wishes to promote. Ostensibly he is giving free expression to his ideas; actually they are dictated by the party.

Eventually a congressional investigating committee catches up with Professor *X* and asks him, under oath, if he is a member of the Communist Party. He declines to answer, invoking the Fifth Amendment, on the ground that his answer would tend to incriminate him. Immediately after the hearing is over he announces to the press that he is not, and never has been, a Communist. When the university authorities examine him, he again denies that he is or ever was a Communist. He points to the fact that he has never taught anything subversive in his classes. He earnestly proclaims that all his activities on the campus are legal, and that to take any action against him because of his petitions, or his views, would be a denial of academic freedom and the right to free dissent.

The university authorities have no direct evidence that he is a Communist. They seek legal advice with regard to the effect of his claim of the privilege against self-incrimination.

Since the university's hearing is not a criminal, or even a judicial proceeding, counsel must advise that it is proper to infer that Professor *X* is a Communist. It also must be obvious to the university authorities that Professor X is lying to the press and to them, or else perjuring himself before the congressional committee. If the answer to the committee's question would incriminate him, he must be a Communist. By denying that he is a Communist, he is denying the existence of the very ground on which he claims the privilege.

A Right Not To Testify . . . *No Right To Remain a Teacher*

Whether Professor *X* is a Communist and a liar, or merely a perjurer, he has no right to remain a member of the university faculty. That he has no such right if he is a Communist is emphasized in the March 24, 1953, statement of the Association of American Universities (with thirty-seven concurring):

> Since present membership in the Communist Party requires the acceptance of these principles and methods [world revolution, deceit, and thought control], such membership extinguishes the right to a university position. Moreover, if an instructor follows communistic practice by becoming a propagandist for one opinion, adopting a "party line", silencing criticism or impairing freedom of thought and expression in his classroom, he forfeits not only all university support but his right to membership in the university.

If on the other hand he has perjured himself, his right is similarly extinguished. As the Association (in the above-mentioned statement) tells us, the very word "university" implies endorsement of the integrity of its members. "Every scholar has an obligation to maintain this reputation. . . . Above all, he owes his colleagues in the university complete candor and perfect integrity."

Those who would disagree with this reasoning cite the case of a bona fide ex-Communist who is asked whether he was a Communist on the day before the hearing. They assert that he may claim the privilege, even though the truthful answer would be "No", since further questions may follow, as to whether he was a Communist a week ago, a month ago, a year ago, and so on for each preceding year. The basis for claiming the privilege in this situation is said to be that the witness may furnish valuable information for a possible prosecution if he claims the privilege only when the questions reach the actual period of his Communist membership. The dates for which he claims the privilege will pin-point the time of such membership, simplifying an investigator's search for evidence.

Whatever merit there may be to this argument[4] it does not affect the conclusions reached above. It assumes that the witness actually has, at some time, been a Communist, and it could hardly be applied in favor of those who refuse to answer the question "Are you a Communist?" As pointed out in *Brown* v. *Walker*, 161 U.S. 591, 599 (1896), the danger to the witness must be "real and appreciable". Even if the required degree of danger to the witness may arise when a series of questions of the type described begins to develop, it obviously is not presented by the initial question as to whether the witness is presently a member of the Communist Party. As *Brown* v. *Walker* says, quoting Lord Chief Justice Cockburn (*id.* page 600):

> We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice . . . it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.[5]

Suppose Professor *X* tells the congressional committee under oath that he is not now a member of the Communist Party, but he claims the privilege, and states that the answer would tend to incriminate him, when he is asked if he was ever a member in the past. To the university authorities, on the other hand, he states that he has never been a member of the Party. There would seem to be no reason why the university should not infer, for the reasons set forth above, that Professor *X* either was a Communist at some time in the past, and is now lying to them, or that he perjured himself when he claimed that the answer to the committee's question would incriminate him. As in the case of the question as to present membership, there is no conceivable hypothesis under which a negative answer would incriminate him.

Professor *X* may, however, make the problem more difficult. When the university holds its hearing, instead of cutting the ground from under his feet by denying past Communist associations, he freely admits them. He may state that he has formally resigned, or that although he has made no formal resignation, he has for several years been completely inactive, and no longer believes in Communism. Again the university has no evidence to the contrary.

The inference to be drawn from a claim of the Fifth Amendment no longer comes into the picture, because Professor *X* is admitting what might be inferred. The university's action in this case should depend upon whether Professor *X* can convince those responsible that he has in fact turned away from Communism.

(Continued on page 369)

4. This argument is based on that theory of the privilege which permits a witness to refuse to furnish facts which may give clues in aid of extra-judicial detection of his crime. Professor Wigmore, at least, who questions the soundness of this theory (*op. cit. supra* Note 2, Sec. §2261, pages 358-362) would certainly oppose its extension to clues to be derived, not from the confession of facts, but from the refusal to testify.

5. See also *Mason* v. *U.S.*, 244 U.S. 362 (1917), affirming a judgment of contempt against witnesses who refused, in a grand jury investigation of gambling, to state whether card games were being played at their tables.

Administrative Procedure:

The Conference Submits Its Final Report

by **Patricia H. Collins** · *of the District of Columbia Bar*

▪ The President's Conference on Administrative Procedure, appointed in the spring of 1953, was composed of the representatives of fifty-six federal agencies, twelve practicing lawyers, three federal judges, and three federal trial examiners. Under the chairmanship of Judge E. Barrett Prettyman, of the United States Court of Appeals for the District of Columbia Circuit, this "unique experiment in government" conducted a detailed study of ways and means of improving federal administrative procedure. The Conference held its final plenary session last October and November, adopting a number of recommendations, which are included in its final report. The following article is a summary of the Conference's work.

▪ In its final plenary sessions on October 14-15 and November 8-9, 1954, the President's Conference on Administrative Procedure reviewed the recommendations and reports of its committees on the remaining subjects which it had undertaken to study.[1] With Judge E. Barrett Prettyman, of the Court of Appeals for the District of Columbia Circuit, as Chairman, the Conference was composed of agency representatives, practicing lawyers, federal judges and hearing examiners. Following the reading of letters from President Eisenhower and Attorney General Herbert Brownell, Jr., the Conference turned to agenda which included such items as the recruitment, compensation and status of federal hearing examiners, uniform rules of procedure and the previously unexplored subject of cost of transcript in administrative proceedings.

The Conference devoted approximately half of its final sessions to the reports and recommendations of its Committee on Hearing Examiners, of which Earl W. Kintner, General Counsel of the Federal Trade Commission, was chairman. The reports of the committee, based upon research, questionnaires and public hearings, constitute the most comprehensive body of materials yet collected on hearing examiner questions. The entire Committee agreed on the necessity for improving the hearing examiner program under Section 11 of the Administrative Procedure Act. However, since the Committee was evenly divided on important issues, two sets of recommendations were submitted to the conference.

The principal issue presented by these divergent committee recommendations was whether the Civil Service Commission should continue to administer the hearing examiner program or whether it should be transferred to an Office of Administrative Procedure which would be an independent agency headed by a five-man board. The argument in favor of transferring the program to such an Office was that the Civil Service Commission by reason of past mistakes had lost public confidence. For example, the Commission was criticized for establishing more than one salary grade for the hearing examiners employed in a particular agency. It was asserted that the resulting possibility for promotion had created problems which the Commission could not meet, and provided opportunities for agency pressure upon examiners.

The Commission was further criticized for using the same hearing examiner register since 1949. In addition, it was urged that neither the Civil Service Commission nor its staff possesses sufficient familiarity with the needs of the administrative process to control the recruitment, compensation and tenure of hearing examiners. Repeated emphasis was placed upon the fact that at its Atlanta meeting in March, 1954, the House of Delegates of the American Bar Association had recommended termination of the Civil Service Commission's administration of Section 11 of the Administrative Procedure

1. The organization and purposes of the Conference were described in the September, 1953, issue of this JOURNAL, 39 A. B. A. J. 798, while the work of the second plenary session of the Conference was discussed in the February, 1954, issue, 40 A. B. A. J. 129.

Act in favor of administration by an independent Office of Administrative Procedure or presidential appointment of hearing examiners. A transfer to such an office was urged by Mr. Kintner, Chairman of the Committee, and by L. Paul Winings, General Counsel of the Immigration and Naturalization Service, Richard S. Doyle, practicing lawyer of Washington, D. C., and Edwin L. Reynolds, Solicitor, Patent Office, who were members of the committee.

Those who supported continued administration by the Civil Service Commission, with changes, urged that hearing examiner positions should be retained in the regular civil service system to keep them out of politics. They further contended that the Commission had profited by its mistakes, as shown by its reopening of the hearing examiner register in the summer of 1954, and by its establishment of a single salary grade for hearing examiners employed in such agencies as the National Labor Relations Board and by the reduction of the number of hearing examiner salary grades in the Interstate Commerce Commission. Supporting the continued administration of the Civil Service Commission was Wilbur R. Lester, formerly a practicing lawyer in Washington, D. C., now professor of law at the University of Cincinnati, who was joined by Joseph L. McElwain, Chairman of the Appeals Council of the Social Security Administration, Laurence V. Meloy, Assistant General Counsel of the Civil Service Commission, and William F. Scharnikow, hearing examiner for the National Labor Relations Board, all members of the Committee on Hearing Officers.

The Conference previously had recommended the establishment within the Department of Justice of an Office of Administrative Procedure, headed by a single director, to perform research and advisory functions looking to the continuous improvement of administrative procedure. The proposal of the Kintner group would have modified this earlier recommendation of the Conference by making such an Office an independent agency, headed by a five-man board, rather than by a single director, and by adding to its functions the present hearing examiner functions of the Civil Service Commission.

Improving the Program . . . *Two Approaches Are Proposed*

The extensive debate between advocates of these proposals revealed general agreement that the administration of the hearing examiner program should be improved. Specifically, there was wide agreement that there should be brought into the administration of Section 11 the judgment of lawyers with experience in administrative proceedings. The Kintner group would have added this element by means of a proposed five-man board to head an Office of Administrative Procedure to which they would have transferred the entire program. The Lester group proposed to do so by including at least two such experienced lawyers upon a committee of five persons who would direct a Bureau of Hearing Examiner Administration within the Civil Service Commission.

Some of the Conference members expressed fears that under the proposal of the Kintner group such an Office of Administrative Procedure would become a "super-agency". These misgivings were based, at least in part, upon the fact that as a part of their proposal to transfer the hearing examiner program to it, the Office would have been charged with "constantly guarding against any encroachment upon the independence of hearing officers or upon the integrity of the administrative process". Some delegates felt that such language had implications going beyond the question of who was best qualified to administer the recruitment, compensation and tenure of hearing examiners.

Ultimately, on October 14, the Conference voted, thirty-five to twenty-three, to recommend continued administration of the hearing examiner program by the Civil Service Commission. On November 8, proponents of transferring such functions to an independent Office of Administrative Procedure moved for reconsideration of this vote, but the motion failed to obtain the support of an absolute majority of the Conference membership as required by its rules. The recommendation adopted by the Conference calls for consolidation of the Civil Service Commission's hearing examiner functions into a Bureau of Hearing Examiner Administration to be headed by a five-man committee. Also on November 8, Robert Ginnane, a delegate from the Department of Justice, and William Finan, a delegate from the Bureau of the Budget, jointly offered a motion to reconsider this recommendation so as to place the Bureau under a single administrator assisted by an advisory committee large enough to take into account the different points of view within both the agencies and the Bar. This motion also failed to obtain the requisite majority.

The Conference further recommended a continuation of the present system under which agencies appoint examiners from a competitive or ranked register prepared by the Civil Service Commission. However, noting that the existing hearing examiner register had been established in 1949, the Conference recommended that a competitive register be maintained on a current basis as far as practicable. An amendment which would have permitted an agency to appoint to a hearing examiner position anyone on the register regardless of rating was rejected.

It was the unanimous recommendation of the Committee on Hearing Officers that a single salary grade be established for the hearing examiners in each agency. It was noted that the Civil Service Commission was already moving in this direction, having established a single salary grade for hearing examiners in some agencies and having reduced the number of salary grades in others. Mr. Ginnane placed before the Conference an amendment designed to provoke discussion of the wisdom of establishing a single salary grade thereby depriving hearing examiners of the in-

centive of working for promotion and also precluding the recruitment of young lawyers to be trained as hearing examiners. Extensive debate ensued and the Conference voted twenty-six to twenty-three to recommend "That the Civil Service Commission establish for the hearing examiners in each agency one or more salary grades, taking into account the diversity of the agency's functions, the desirability of minimizing the administration of promotions, and the possibility of recruiting examiners at lower grades and increasing their compensation as, through increased experience and competence, they perform increasingly responsible work."

The Committee on Hearing Officers was split on the matter of the range of hearing examiners' salaries. Half recommended that hearing examiners' salaries be increased to a range of $12,000 - $14,000 per year, while the other half of the Committee recommended that their compensation be fixed in federal salary grades GS-13 ($8,300) - GS-15 ($11,800), the present salary grades for the great majority of hearing examiners. The latter recommendation was adopted by the Conference.

The Conference debates and votes revealed that there exists within the agencies and within the Bar substantial disagreement on many questions relating to hearing examiners. It is a wholesome fact that the lines of disagreement are not between the agencies on one side and the Bar on the other.

An Over-all Problem . . . *The Cost of Transcripts*

A subcommittee established by the Conference to study the cost of transcripts in administrative proceedings was characterized by Gladys Harrison, its Chairman, as a "late comer". It was constituted in the Committee on Trial Problems in April, 1954, following adoption of the subject for study at the second plenary session of the Conference.

Miss Harrison, an Assistant General Counsel in the Department of Health, Education and Welfare and the representative in the Conference of the Public Health Service in that agency, had as members of her subcommittee John S. Forsythe, representative from the Federal Coal Mine Safety Board of Review, general counsel of that agency, and John L. McIntire, representative from and General Counsel of the Public Housing Administration in the Housing and Home Finance Agency.

This group moved into its task by sending questionnaires to all of the federal agencies which conduct administrative proceedings of a type requiring a transcript of hearing. Returns to the questionnaires, oral testimony from a substantial number of witnesses who appeared before the committee and extensive written material submitted to the subcommittee were analyzed.[2] Existing reporting contracts were examined and tabulated.[3]

It has long been recognized that the cost of transcripts is part of the over-all problem of cost and fairness in federal administrative proceedings. In fact, as early as 1941, the Final Report of the Attorney General's Committee on Administrative Procedure (page 126) contained this statement.

> The sheer costliness of securing a stenographic transcript of a record compiled in an administrative proceeding is shocking. A careful survey should be made in order to determine whether cooperation among the agencies might not secure a lowering in the expense. While in many agencies the cost of transcripts is less than for corresponding records of most court proceedings, there is no uniformity in this respect, and the charges are in almost every instance more than is seemly when cheapness is one of the asserted virtues of the administrative process. It is possible that a grouping of the reporting services for which the agencies now contract might lower costs. In any event, continued inattention to this detail of the conduct of proceedings is not justifiable.

The first recommendation offered by Miss Harrison's subcommittee would apply with respect to transcripts of agency proceedings those general principles already adopted by the Conference which urge "that every agency consider unnecessary delay, expense and volume of records . . . to be detrimental to the public interest".[4] It recommends "that each agency develop and make effective a policy designed to assure the furnishing of copies of transcripts with reasonable promptness and at fair cost to persons having a legitimate interest therein".

The Subcommittee next recommended that the choice of the method of providing transcripts be kept flexible, the choice being between contract reporting, the use of government personnel, or a combination of both. In explanation of this recommendation, Mr. Forsythe said, "We feel that the agencies should be kept free to do as they think is best, that is, all the agencies should not be tied to any particular system. We feel also that the agencies should reexamine the clauses in their invitations to bid. Some agencies preclude certain types of bidding. They should be sure that what they are doing is the cheapest and best way."

In its next recommendation, the Subcommittee urged that the agencies actively explore, from the standpoint of feasibility and reduction in over-all cost, the utilization of new types of recording and transcribing devices and the training of government personnel in their use. Attention was directed to recording devices presently in use in the government agencies. These included the closed microphone (a kind of mask placed over the reporter's face into which he speaks privately), the open microphone of the familiar type which records a speaker's voice and, for the same purpose, the tape and wire recorders. It was found that these devices have been evaluated against shorthand and stenotype reporting when used in adversary verbatim reporting. Shorthand, according to these evaluations, proves to be the least accurate of the methods tested. Accuracy in typed records reported in experiments by the Navy

2. See Report of the Subcommittee on Cost of Transcripts, September 10, 1954, President's Conference on Administrative Procedure.
3. These are summarized in the subcommittee report.
4. See "The Conference on Administrative Procedure: Report on the Second Plenary Session," 40 A. B. A. J. 129.

Department proved to be as follows: shorthand 75 per cent, stenotype 80 per cent, open microphone 95 per cent, and the closed microphone device 99 per cent. The Conference approved the Committee's recommendation, urging further exploration in this field.

The Subcommittee's next recommendation consisted, in part, of a general policy statement to the effect that the Government's share of the cost of transcripts should be provided by appropriation like any other administrative cost. In addition, there is a recommendation for legislation which would permit agencies which choose to use their own reporters in preparing transcripts to credit any income derived to their own appropriations, not for general purposes, but for the reimbursement of specific costs incurred. The latter recommendation met with some opposition from a representative of the Bureau of the Budget, who pointed out that public finance administrators do not look with favor upon such a segregation and dedication of receipts. However, the recommendation survived a motion to table, and was adopted by the Conference.

The Subcommittee specifically recommended that contract specifications for reporting services should (1) eliminate the practice of some agencies of awarding a reporting contract to the bidder offering the highest cash bonus to the Government; (2) provide for furnishing copies of transcripts to the agency at the same maximum rates as to private parties, unless in a particular case there are factors which justify free transcripts for the agency with private parties bearing the entire cost of recording and transcription; (3) set forth to the greatest extent practicable the basis upon which the contract will be awarded (*e.g.*, indicating the relative weight which will be given to prices for various types of copy).

The speculative factors in the award of agency reporting contracts were particularly noteworthy in the Subcommittee's investigations. "The contract reporting business in the Government field", it is said, "is both lucrative and highly speculative." It was found, for instance, that in a number of government agencies reporting contracts are awarded on the basis of a cash bonus paid to the Government. Reporting companies are willing to bid on a basis which results in a loss on transcripts furnished to the Government, in the hope of offsetting the loss by sales to the public of the various types of copy prepared. This practice of "risk bidding" the Subcommittee condemned, pointing out that, as a matter of principle, "it is not proper to require the public or the parties to pay out-of-pocket the extra cost which is paid into Government in the form of a bonus just to get the contract".

The Conference supported this conclusion of the Subcommittee as well as its view that the Government should bear its proportionate share of the cost of preparing transcripts of administrative hearings.

These recommendations were adopted without amendment and the Conference moved on to the Subcommittee's last recommendation in which an Office of Administrative Procedure, if established, the Bureau of the Budget, the Civil Service Commission and the General Services Administration are urged to give assistance to the agencies on the whole problem, through studies and the dissemination of technical advice and information. The transcription problem, in the belief of the Subcommittee, is primarily one of management and therefore the responsibility of the management agencies of the executive branch of the government in which there has been "no central point of leadership".

Contemptuous Conduct . . . *No Problem Seems To Exist*

At its opening session in June of 1953, the Conference adopted for study the question of whether administrative agencies needed additional powers to deal with contemptuous conduct in the course of proceedings. A Subcommittee in the Committee on Trial Problems was constituted to examine the question, and Neil Brooks, Associate Solicitor for Litigation in the Department of Agriculture and delegate from the Agricultural Marketing and Commodity Stablilization Services in that Department, was named Chairman of the Subcommittee. As the result of information compiled from questionnaires sent to the agencies, the Subcommittee reported to the Conference that "The answers indicate there is no problem with respect to the ability of the agencies to insure the production and submission of all relevant testimony and evidence at the hearings and to insure orderly conduct."

The final day of the Conference session opened with the presentation of recommendations by the Committee appointed to consider the feasibility and desirability of formulating uniform rules of procedure for administrative agencies. Thomas J. Herbert, Chairman of the Subversive Activities Control Board and representative of that agency in the Conference, was Chairman of the Committee on Uniform Rules. In his opening statement Mr. Herbert said, "You will remember that our Committee was developed as a result of the adoption by the Conference of a suggestion of Attorney General Brownell that such a committee be organized. Now, it may be said that the Conference is really indebted to a great many members for the time and effort that they gave to this problem. We recognized at all times that we were not given the job of formulating uniform rules of procedure, but were rather directed to investigate the extent to which it would be desirable and feasible to have uniform rules."

To reduce the assignment to a manageable size, the committee first determined to confine its inquiry to the possibility of uniform rules for proceedings governed by Sections 7 and 8 of the Administrative Procedure Act. It was then decided to base studies on a sample of ten agencies, and to determine upon certain points or aspects of procedure on which to

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Insurance in Divorce Cases:

Unsettled Rights Mean Future Litigation

by **William E. Mooney** · *of the Nebraska Bar (Omaha)*

▪ This article by the general attorney for a large life insurance society emphasizes the numerous problems connected with life insurance policies when divorce proceedings are contemplated. Most married couples have some kind of life insurance, usually on the life of the husband, with the wife named as beneficiary. Many clients—and worse, some lawyers—forget entirely about the existence of the insurance during the unpleasant legal proceedings that terminate the marriage, and the door is left wide open to future trouble over the rights of the parties to the forgotten policies.

▪ Experience has indicated that some attorneys are not satisfactorily counselling their clients with respect to life insurance on the husband's life when the husband and wife are involved in divorce proceedings. A steady stream of litigation indicates that the life insurance was not adjusted in the divorce proceeding or by appropriate assignments simultaneous with the decree. Counsel for some life insurance companies recently have expressed concern that parties to divorce cases overlook the disposition of the life policies when the property rights of the divorced parties are being settled.[1] Many divorces are granted on substituted service, and so the husband's rights in his insurance are not within the jurisdiction of the court and cannot be settled.[2] If the divorced wife has possession of the policies, there are times when the parties know each other's address and they could settle these problems by correspondence. The failure to adjust such problems leaves many loose ends for future litigation.[3]

The cases in the law books, numerous though they may be, are only a small percentage of those actually litigated or on which conflicting claims are made. Only the cases involving substantial sums get into the reviewing courts.[4]

This problem has been the subject of discussion in at least two recent zone meetings of the National Association of Insurance Commissioners and frequently when counsel for life insurance companies meet. No conclusions have been reached as it has been felt that there was nothing practical that the insurance companies could do. It is not a situation calling for a new law or a rewriting of the life insurance policies; rather it is a matter of attorneys in the divorce proceedings availing themselves of the present remedies open to them—or, failing that, to have the parties adjust their rights in some satisfactory manner.

Life insurance when purchased by a husband usually names the wife as the beneficiary. The right to change the beneficiary may be reserved to the husband.[5] Many policies, however, provide that a change of beneficiary may be effected by a request to the company and a surrender of the policies for the proper endorsement.[6] When the beneficiary has a vested interest in the policies, which is usually the case when the right to change the beneficiary is not reserved to the insured, the change of beneficiary must be made jointly by the insured and the named beneficiary.

Attorneys are not entirely to blame for these unsettled problems,

1. *American Natl. Ins. Co.* v. *Reid* (Okla. 1952), 108 Fed. Supp. 428; *Mc Phail* v. *John Hancock Mut. Life Ins. Co.* (Ky. 1952) 108 Fed. Supp. 902; *Shaw* v. *Board of Administration*, 109 Cal. App. 2d 770, 241 P. 2d 635 (1952); *Thorp* v. *Randazzo*, (Cal. App. 1953) 252 P. 2d (1953).

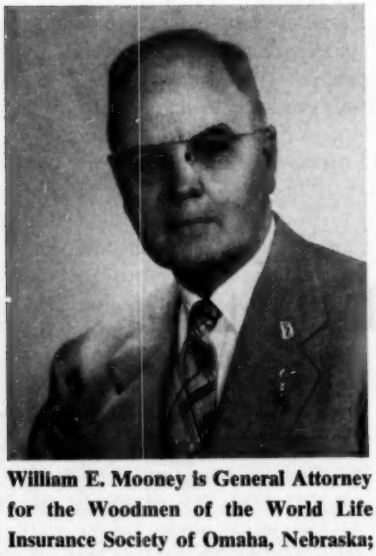
2. *Whitelaw* v. *Whitelaw* (Ohio St.) 113 N. E. 2d 105 (1952).

3. *Stone* v. *Stephens*, 92 Ohio App. 53, 110 N. E. 2d 18 (1950).

4. My own experience indicates over fifty such controversies a year, with none, in recent years, going to a reviewing court. This has been due, in large part, to the expense involved in appeals. If this is true as to only one insurer, there could be several thousand a year for all insurers.

5. *Cadore* v. *Cadore* (Fla. 1953) 67 S. 2d 635, where the divorce decree required the defendant husband to change the beneficiaries in his life insurance policies to his children, but no mention was made that the change was to be irrevocable. Another change was later made to the defendant husband's second wife.

6. *Natl. Life & Acc. Ins. Co.* v. *Walker* (Ky. App. 1952) 246 S. W. 21 139; residents of community property states do not have any particular advantage as there seems to be the same number of controversies in those states. A separation agreement may void the right to change the beneficiary. *Boffa* v. *Bove*, 121 N. Y. Supp. 2d 709 (1953).



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as parties to some divorce cases do not reveal the existence of life insurance. Sometimes the matter of life insurance on the husband is concealed from the lawyers, even after inquiry has been made. In the search for assets of the husband it would seem that the status of his life insurance should be carefully checked, even by his attorney. The husband may need a release from his wife or a return of the policies.

The life insurance company knows little about the marital relations of its policyholders. Even if it did, there is nothing it could do but to continue to perform the contract, or to be ready to perform when the occasion required. Very often the divorced wife will continue to pay the premiums, especially when the policies are in her possession. The company cannot refuse to accept the payments, no matter from whom they may come. The fact that the divorced wife may be a volunteer without any legal rights in the matter is something that the company cannot be concerned with. It may be a matter on which she should be properly advised as she may actually be losing the money she pays out.

Possession of the Policies . . . *The Legal Effect*

Counsel for life insurance companies have discussed the arguments of a divorced wife when she claims the dividends or cash value of the insurance on her divorced husband's life without any accompanying evidence of a gift to her. The claim is usually based on the fact that she has possession of the policies, that she may be the named beneficiary, coupled with payment of some or all of the premiums. Once in a while there will be a written or parol assignment as evidence of a gift of the policies,[7] and, in those instances, the matter is somewhat simplified.

A divorced wife who has been practical enough to see that the premiums have been paid on the husband's life insurance during the marriage, and then continues such payments after the marriage has been dissolved, may not realize that possession of the policies and payment of the premiums, by themselves, will not create a valid claim for her.[8]

Some divorced wives, in order to obtain the full advantage of the husband's insurance, will advise the companies of changes of address over the purported signatures of the insured, so that they, the divorced wives, will receive the premium notices, dividend checks and the like. It is not rare for a divorced woman to sign her former husband's name to such requests and to endorse checks payable to him without any power of attorney or proof of authority whatsoever.

In the meantime the divorced husband may have obtained a duplicate policy in which another person is designated as the beneficiary, or he may make a will wherein he names another as the beneficiary.[9] It would not be too much to assume that some husbands may feel that their insurance is cancelled when they do not receive notices of premiums due. Many life insurance companies will not issue a duplicate policy unless the original policy is surrendered, or a bond is issued to cover any loss that might occur,[10] and a will is not a satisfactory method to effect a change of beneficiary.

Some divorced husbands abandon their life insurance, especially if the amount is small and the divorced wife has possession of the policy, but this abandonment may be due to the belief that the policy is not in force, or because of frustration due to the policy being out of his possession. However, apparent abandonment of the insurance by the husband will not give the divorced wife any better claim.

Life insurance rights might be adjusted, sometimes, where only constructive service is had in a divorce suit. The wife often knows the address of the husband, and when he resides in another state she must see that he is served by publication or by some other method of substituted service. It is possible to settle the insurance problem without even presenting it to the court. A study of many recent cases in the reviewing courts indicates that it would have been much cheaper to have settled the insurance problem without the ensuing litigation. When the court awards the insurance to the husband or wife, no life insurance company will take such a decree without additional inquiry, and often then only on the written consent of both the

7. *Ratsch* v. *Rengel*, 180 Md. 196, 23 A. 2d 680 (1942); *New York Life Ins. Co.* v. *Inskeep* (Cal. 1951), 96 Fed. Supp. 653.

8. *Acadia Mut. Life Ins. Co.* v. *Newcomb*, (Del. Ch. 1941) 21 A. 2d 723.

9. *Stone* v. *Stephens*, 155 Ohio St. 595, 90 N. E. 2d 766 (1951); see note 3 as to this case in Ohio App. Court; *Barnes* v. *Creighton* (Tex. Civ. App. 1952) 252 S. W. 2d 1010.

10. *Smith* v. *Smith* (Mo. App.) 181 S. W. 2d 793 (1944). This case has been before the court on several subsequent occasions. See 192 S. W. 2d 691 (1946); see also *Dryman* v. *Liberty Life Ins. Co.* 216 S. C. 177, 57 S. E. 2d 163 (1950).

A certificate of membership in a fraternal benefit society may be duplicated when the original certificate is lost or beyond the member's control. These societies usually provide that one divorced from a member shall not be entitled to any benefits even though no re-designation of beneficiary may have been made.

divorced husband and divorced wife. After the divorce case has been settled it may be difficult to get the losing party to agree to anything more. Therefore, one who may be awarded the insurance in the divorce decree may have purchased nothing more than further ligitation.[11] The dissenting opinion in the *Whitelaw* case[12] overlooks the chaos that could result if that were to be the law. Most life insurance companies operate in many states. If the law of one state would permit a wife, in a divorce action, to obtain rights in life insurance on her husband's life, although the husband would be in the litigation only through substituted service, it would not be *res adjudicata* if and when the husband sued the insurance company in another state. So, the insurance company could be subject to two attacks, and both might be successful.

The ideal method of settling insurance rights would seem to be to consider the cash values in determining the whole net worth of the husband. From the insurance company's interest and probably that of the public it might be best to surrender the policies for their cash value rather than to continue them with the divorced wife as the beneficiary. This would be particularly true if the divorce court awards the policies to the wife instead of the husband giving them to her as part of a property settlement. A divorced wife usually has no real insurable interest in the life of her divorced husband, even though he may be required to pay alimony and the policies act as a sort of guarantee that alimony payments will continue.[13] The early death of the divorced husband would be to the financial advantage of the divorced wife. It is true that divorced parties do not live together, but it would be unusual for a divorced husband to make an original application for life insurance, naming his divorced wife as his beneficiary.[14] Many divorced wives remarry so that when a court is inclined to give the life insurance to the divorced wife a provision should be added to the decree that the insurance is to be returned to the husband on the wife's re-marriage. Provision for reimbursement for premiums paid by the divorced wife should also be included.

The divorce decree, in which the rights of the respective parties are settled, may be sufficient in itself, but it would seem advisable to have each husband execute an irrevocable assignment of the policy and file it with the company. Actual possession of the policy and immediate change of beneficiary would seem to be necessary. The insurance company is not a party to the divorce proceeding and it is not bound by the decree. Provision might be made as to what may happen to the insurance on the decease of the divorced wife prior to that of her divorced husband, and as to what should be done if the divorced wife re-marries. If the divorced wife is to be given the right to receive all dividends and to have the right to select any of the non-forfeiture options, those privileges should be part of the assignment.

11. *Prudential Ins. Co.* v. *Irvine*, 338 Mich. 18, 61 N. W. 2d 14 (1953).
12. See Note 2.
13. In Texas, divorce automatically terminates the insurable interest of the divorced wife. *Whiteselle* v. *Northwestern Mut. Life Ins. Co.* 221 S. W. 575 (1920); see also re *Michigan*: *Minn. Mut. Life Ins. Co.* v. *Hendrick*, 316 Mich. 253, 25 N. W. 2d 189 (1946); *Missouri*: *Orthwein* v. *Germania Life Ins. Co.* 261 Mo. 650, 170 S. W. 885 (1914); and *Louisiana*: *Metropolitan Life Ins. Co.* v. *Haack* (La. 1943) 50 Fed. Supp. 55.

The President's Page

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lative stage and the unstinting support of every bar association when they are finally presented to the courts for adoption.

Last August the House requested that the National Conference of Bar Presidents poll its members with a view to determining national sentiment on the question of inclusion of lawyers within the social security system. This poll indicated that lawyers are desirous of having available voluntary coverage, and that view prevailed in the decision of the House of Delegates.

Upon the recommendation of the Committee on Scope and Correlation, the House voted to create a Special Committee which will determine whether there is sufficient interest among the members of the Bar to justify creation of a Section of Family Law. The jurisdiction of this Section would include marriage, divorce and annulment, adoptions, rights of and guardianships for minors and incompetents, maintenance and support, youth correction laws, welfare problems, husband and child, and parent and child. Members of the Association are invited to express themselves on this subject by writing to the Executive Director, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois.

The Committee on Jurisprudence and Law Reform proposed support of a constitutional amendment which would make mandatory the retirement at age 75 of members of the Supreme Court of the United States and all inferior federal courts. The House adopted this recommendation.

Each of these decisions by the House represents several thousand hours of study when the work our committees do in preparation of their reports to the House is considered. If the Association were billed on an hourly basis for the time our Special Committee on Disciplinary Procedure has spent on the model Rules, I assure you the bill would be staggering.

Each of us owes it to his profession to see that the weight of the 1,500 state and local bar associations is thrown into the balance in support of these recommendations by our elected representatives, the members of the House of Delegates.

Lawyers and Accountants:

Chairman Jameson's Statement to the House

■ Reporting to the House of Delegates on current negotiations between the Association and the American Institute of Accountants, William J. Jameson, of Montana, Chairman of the Committee on Professional Relations, was able to state that progress was being made. Because of the importance of the subject matter, the complete text of Mr. Jameson's oral statement is set forth here. The Committee on Professional Relations is continuing negotiations and will have a further report in the May issue of the Journal.

■ The Committee on Professional Relations had rather hoped that it might be possible to come before you today with a definite agreement for your approval. We are not able to do that, but we feel very definitely that we can report progress.

I think it might be advisable first of all to review, just very briefly, the origin of the problem confronting the Committee and the reason for its creation.

You may recall, at the meeting of the House of Delegates in Atlanta, about a year ago, the attention of the House was called to a proposal in Congress to modify Section 10.2 (f) of Treasury Circular 230 to eliminate the provision "that nothing in the regulations shall be construed as authorizing persons not members of the Bar to practice law".

The House authorized the appointment of a Special Committee on this circular to oppose the deletion of that particular section. A subsequent amendment proposed that "the expression 'to practice law' herein shall not include the doing of any acts which an enrolled agent is authorized or required to do by any other provision of these regulations".

The Special Committee on Circular 230 made an excellent statement in opposition to both of those proposed amendments, to which was attached as an appendix the agreed statement between the lawyers and the accountants, adopted in 1951. That statement was printed, I believe in the November issue of the JOURNAL [40 A.B.A.J. insert page iii], and no doubt all of you read it.

In July, shortly before the Annual Meeting, there was introduced in Congress H.R. 9922, by Congressman Reed, of New York, who was then Chairman of the Ways and Means Committee. This bill provided that "the Secretary of the Treasury shall by regulations prescribe, to the extent that he considers practicable and desirable, qualifications, rules of practice and standards of ethical conduct, applicable to persons who assist taxpayers in determination of their federal tax liabilities, in preparation of their federal tax returns, and in settlement of their federal tax liabilities, in settlement with the Internal Revenue Service; provided, that no person shall be denied the right to engage in such activities solely because he is not a member of any particular profession or calling".

Upon the recommendation of the Sections of Taxation and Administrative Law and the Committee on Unauthorized Practice, the President was authorized to appoint a Special Committee to oppose the enactment of H.R. 9922 and any similar legislation, and the Committee of which I am now Chairman was appointed.

Then it developed that it was advisable, and the Board of Governors so provided in October, to expand the scope of our Committee and make it a Committee on Professional Relations, and include an authorization to attempt to negotiate a settlement with the accountants and do more—not simply oppose the enactment of H.R. 9922.

While H.R. 9922 was not acted upon in the last Congress, the same bill was introduced as H.R. 1601 and a similar Bill as H.R. 2461 in the present Congress, and they are now in the Ways and Means Committee.

The Committee on Professional Relations met first in October and outlined a course of action. Shortly after that time we found that the American Institute of Accountants had sent a letter to all of its members, urging them to get in touch with their Congressmen with respect to H.R. 9922. Our President, Loyd

Wright, at that time sent a letter to every member of Congress, and I am just going to read one paragraph because I think it summarizes pretty well. He said this:

> Rather than have you bombarded by letters from the 250,000 lawyers in the United States and their clients, we think it advisable to simply inform you at this time as to our objection to such legislation, the enactment of which we believe would be an unwise interference by the Federal government with the traditional control of the practice of law by the several states.

That sets forth the position of our Committee and the position of this Association.

About that time, also, there was called to our attention a pamphlet that was put out by the American Institute of Accountants, entitled, "Helping the Taxpayer".

I was a little surprised in appearing before the Conference of Bar Presidents yesterday, to find many had not seen the pamphlet. In fact, a minority of the group there had seen the pamphlet. But, nevertheless, it had been circulated rather widely, and we have had requests from many members of the Bar to let them know whether that did correctly portray the position of the American Bar Association and just what our position was in our relationship with the accountants.

I am sure we will all agree that the publication of that pamphlet was unfortunate. We have taken action in two respects. In the first place, the Special Committee on Circular 230, after finding that the pamphlet had been presented to the Treasury Department wrote a letter to the Under Secretary of the Treasury, outlining our position, our answer to that particular pamphlet; and now today, we have put before you a statement entitled, "Lawyers and Accountants in Tax Practice", which answers the pamphlet and we think correctly sets forth the facts as to this problem. I might say that is not put out with any idea of aggravating the present situation with the accountants. On the contrary, we think it will tend to clear the atmosphere and not hamper us with our negotiations with the accountants.

Now, what about these negotiations? Well, in December, our President, Loyd Wright, and Maurice Stans, the President of the American Institute of Accountants, had an informal meeting. There was no question that it was the sincere desire of both of them to bring about a settlement which would avoid the controversy that is now in prospect in Congress, and committees were appointed to negotiate; a subcommittee of five from our committee, and a committee of five appointed by Mr. Stans from the American Institute of Accountants.

We have been negotiating in good faith and that is true of both sides. I think you can appreciate some of the difficulties involved in negotiations of this sort.

In the first place, there are bound to be some honest differences of opinion on fundamental principles. In the second place there is the difficulty of phrasing accurately just what we have in mind in order to overcome the fears and the objections of both groups. There are differences of opinion on the part of members of the Bar just as there are differences of opinion on the part of members of the American Institute of Accountants.

Then, of course, you have the problems that you always run up against in any settlement negotiations. First, there must be good faith, and as far as the negotiators are concerned on both sides, that problem has been met.

Then there is the problem of appreciating fully the position and the fears and objections of the other party. There is the difficulty of both sides appraising realistically all the factors that are involved. So as I say, taking all those things into consideration, it is not surprising that we have run into some difficulty, but I think under all the circumstances that we have made very good progress and we have agreed upon a number of matters.

Now, one other thing I think I should say in this connection. In addition to the committee of eleven, whose names appear on the pamphlet which you have before you, we have invited to all of our meetings the Chairmen of the Section of Taxation and the Section of Administrative Law, and the Chairman of the Unauthorized Practice Committee and the Chairman of the Special Committee on Circular 230. They have participated in all of our deliberations and have voted with the other members of the Committee and I might say we have gotten along very well.

We feel this to be true—that we must have the cooperation of these groups in anything that is presented to the House of Delegates.

With respect to the present status of our negotiations; it was my initial reaction to present those to you rather fully, but after reflection, and after receiving the good judgment and counsel of the other members of the Committee, I am firmly convinced that would be a serious mistake. It would be a mistake to have any public record at this time of the particular things to which we have agreed and the particular points on which we have not yet reached an agreement. I think you can see where that would be embarrassing, where it might hamper us in our further negotiations with the representatives of the Accountants, so we are not presenting those to you in detail, and I think you can understand the reason.

We will have to ask you to rely on our own judgment and with the understanding when any agreement is reached, it will be submitted to the House for approval.

Now, another question. What will happen if we don't reach an agreement? In that case, the accountants will press very vigorously for the enactment of these two bills that are now pending in Congress, the substance of which I read to you a few minutes ago. They have accumulated a substantial fund for that purpose. In fairness to the accountants, I should say they are not using that fund as a threat or anything of that kind, but we know they do have a very substantial sum of money to

spend for that purpose. We can't hope to match that in the event we get into this controversy.

What does that mean? It means we have to spend some money, of course, not only the American Bar Association, but the state and local bar associations. We do have to match it with the voluntary help of every member of this House and the voluntary help of every state and local bar association in the country.

We hope that won't be necessary. We hope we won't have to call upon you for that help. But we may and if we do call upon you, we certainly hope and expect we will have the wholehearted support of the Bar of the country. I think it would be, and I know all the members of the Committee agree, a serious mistake from the standpoint of both professions, as well as the public, if we do have to get into this controversy. As far as we are concerned, we hope it can be avoided, and that you will approve of our negotiating with the Accountants in the hope we might work out a mutually satisfactory agreement.

So, at this time, I am going to propose a resolution. It has not been cleared officially with the Board of Governors, although we did talk to some members of the Board. As I understand it, we do have a waiver from the Rules and Calendar Committee, and I move the adoption of this resolution.

First, That the Special Committee be continued and be designated the Committee on Professional Relations, and that the President be authorized to determine the number and terms of its members.

Second, That the Committee on Professional Relations be authorized to continue negotiations with the American Institute of Accountants and, at its discretion, to negotiate with other groups, in an effort to reach an agreement, subject to the approval of the House of Delegates with respect to problems arising in tax practice, as well as administrative practice generally.

Third, That the Committee be authorized to oppose the enactment of H. R. 1601 and H. R. 2416, introduced in the 84th Congress, and similar legislation, and to urge the retention of the provisions of Section 10.2 (f) in Circular 230 with respect to practice before the Treasury Department.

I might state that this has the approval of the Chairman of the Unauthorized Practice Committee and the Chairman of the Tax Section and the Chairman of the Section of Administrative Law.

(*The motion was duly seconded, put to a vote and adopted.*)

Chicago Sun-Times

President Loyd Wright welcomes an old friend, actor Charles Laughton, to the Midyear Meeting of the House of Delegates in Chicago last February 21. Mr. Laughton delivered Lincoln's Gettysburg Address and read a condensed version of Washington's Farewell Address to the members of the House. The short ceremony was in commemoration of the two great Presidents whose birthdays occur about the time of the Midyear Meeting.

Is Siwash a Good Law School?

A Frank Discussion of Law School Problems

by **John Leland Mechem** · ***Professor, Dickinson School of Law (Carlisle, Pennsylvania)***

■ **Professor Mechem addresses himself to a hypothetical lawyer whose son is about to enter Siwash Law School, his father's alma mater. He points out that the father is sending his son to a school about which he really knows very little, for law schools can change considerably during a twenty-year period. A law school that was foremost in its state two decades ago may now fail to offer adequate preparation for young men seeking careers at the Bar. Professor Mechem goes on to point out the great financial problems of the schools and to warn that the members of the profession must arouse themselves to the danger.**

■ I am only a lawyer who has been in general practice for thirty-odd years. I am writing this for the thoughtful consideration of other practitioners. I just want to ask you a few simple questions.

1. What law school will your son attend?
2. Why do you send him there?
3. Is it a good law school?
4. How do you know?

Let us put this in a more personal way. I am talking to you, John Jones, Esq., (successful and respected practitioner) in your office.

"I know you have planned to have your son, Jack, come into the office here with you, ever since he was a little boy. He's just finished college and will now have to go to law school. What law school is he going to attend?"

"Siwash Law School, of course."

"Why do you send him there?"

"I went there and I'd like to have him go there, too."

"Is it a good law school?"

"Of course."

"How do you know?"

It is true that Siwash is the oldest law school in the state. It is true that it was a good law school when you went there, twenty years ago. Is it a good law school now?

Would you invest your savings, or your client's funds, in a business solely because it was successful twenty years ago? Of course you wouldn't; you would want to examine its present financial statement and earnings report. What the company did twenty years ago would be immaterial. Mr. Jones, I tell you, earnestly and sincerely, a law school is just like a business. It either improves and becomes better and stronger, or it fails and becomes poor and weak.

The strength of a business depends upon the soundness of its financial structure and the ability, aggressiveness and foresight of the men who run it. The same is true of a law school. It must have sufficient "working capital" to be able to do business without skimping or crimping. It must have a good management, *i.e.*, a strong, capable executive head and a competent, experienced and well-trained faculty.

Mr. Jones, have you ever checked up on Siwash Law School? What kind of a dean does it have? Is he progressive, active, a sound lawyer, a man of unquestioned integrity, with a strong, magnetic personality—in short, a leader? How long has he been dean—too long or not long enough? How did he happen to be selected? What salary is he paid? A dean of a law school has a good deal of responsibility; does your dean have sufficient authority to carry out that responsibility? These are all pertinent questions.

Some law school deans are very able, outstanding men; others have used the deanship as a stepping-stone to a better-paying job. Some are carefully selected because of their personality, integrity, ability and scholarship—men who would be outstanding lawyers whether they were practitioners, judges or teachers. Others may be chosen because they would accept less money than other applicants.

What kind of a faculty does Siwash have? Are they trained, experienced men? How old are they and how many of them were ever in active practice? A boy just out of law school isn't much of a lawyer, although he may become a good lawyer after he has had a few years of

actual practice. A boy just out of law school isn't much of a law teacher, either, although he may become a good teacher after a few years of teaching experience, and a better one if he has had experience both in teaching and practice. How many of the faculty at Siwash Law School were ever in active practice?

Now don't get indignant, Mr. Jones. There are a whole lot of good law schools which are obliged to hire boys who are only recent graduates because they simply do not have the money to hire more experienced men. Furthermore, I doubt if any law school has all of its faculty composed of men who have had previous experience in actual practice. I know I am on solid ground when I tell you that the total number of law school teachers who have never practiced is very large.

So what, say you? Well, Mr. Jones, there has been a lot of heated criticism and charges by practicing lawyers in the past few years that the law schools are not practical, that their graduates know a lot of "book" law, but don't know how to practice law. These charges begat answers, replications and rejoinders; and the articles, pro and con, are numerous, varied and confusing. The fact remains that all too few experienced practitioners ever get on a law school faculty.

You ask why? Mr. Jones, you, yourself, are a reasonably likely prospect for a law school teacher. You have made a success, both professionally and financially; your firm is established, you can withdraw from it and still keep a place for Jack. Maybe you would like to try teaching, just to see what it is all about. I happen to know that Magog Law School needs a good man to teach federal practice and code pleading, with both of which subjects you are familiar. It would be a full-time job.

What does the job pay? I'm sorry to tell you that Magog can only pay $4,000 a year salary. You could hardly be expected to leave your practice, move your family to Magogville and take a full-time job for a mere $4,000 a year? No, I suppose you couldn't—but that's all that Magog can pay for the job. If you can't be tempted, then Magog will have to do just what so many law schools are obliged to do—get a man worth only $4,000 a year to take the position.

Such conditions don't affect Siwash, you say. How do you know they don't? They affect the majority of American law schools. There are a few, a very few, law schools, which are well endowed and have enough income to be able to pay good salaries. There are a few law schools which are in big universities, in wealthy states, and get enough tax dollars to pay reasonably good salaries. There are a whole lot of law schools which are not tax supported and have few, if any, endowments and which have to depend upon tuition to carry on. Many of them have less than one hundred students. One hundred students won't produce very much tuition. There are a lot of state universities which have meager law school budgets because the president or the trustees of the university favor other departments. Has Siwash any endowments? Is it dependent upon tuition money for operating expenses? Have your ever investigated the matter?

You ask me what the average salary for a law school teacher is. That is a carefully guarded secret, on which there is no published information. I can only answer that I know of several law schools that are able to pay only about $4,000 per year. These are marginal law schools. There are several more that can pay only about $5,000, and to the best of my belief, $6,000 is about tops for a very large number of schools. My information comes from a very wide acquintance with law teachers. I know that the turnover in faculties is great, that most of the younger men have a very difficult living, that there are any number of capable law instructors who can be hired away from their present location by an offer of $7,500. No, I'm not talking about the unrecognized schools—those which are offshoots of business colleges and Y.M.C.A. schools; I'm talking about the fully accredited schools.

Why do capable men go into such a calling, you ask? I wonder, myself. Mostly, I think, because they started teaching when they left law school, have accumulated families and responsibilities and hesitate to go through the starvation period that will come if they go into practice—so they stay on, ill-paid. Once on a salary, it is difficult for a man to get off that basis.

Is this a healthy situation, you ask? Of course it is not. It is very unhealthy. Very few law school faculties are entirely composed of competent high quality men. The great majority of law schools have some good men together with some that are not good, and some that are inexperienced and mediocre. That is necessarily so because very few law schools have enough operation income to pay proper salaries. They are obliged to "piece out" with some beginners and some "part time" men who come in from outside and teach one course, or perhaps two courses, to pick up extra income. Some are able to command good part-time men, who will sacrifice personal income because of a sense of loyalty to their school; but a good many "part-time" men are not particularly good teachers.

Can anybody become a good teacher, you ask? Definitely, no. Teaching is an art. The good law teacher is born, not made. He must inspire a miscellaneous collection of earnest young men, some bright and some dull, to work harder than they want to, and to be interested in subjects for which they have no natural interest, and to delve into a great mass of disconnected material. He must lead and guide their learning, chide them for their shortcomings, encourage them to success—and then judge them fairly and inexorably. He must never be satisfied with his teaching nor his materials; but strive ever to make better today what was yesterday's best. There is an unlimited mass of material to be used, and he must pick the best of it and cover a whole subject in a time too limited

for its proper consideration. He must have an answer for every question. Teaching is a good deal like major league baseball. You are a hero as long as you can hit home runs. Fan out once and you are a bum. It's not easy.

And for this superman, the law schools will pay $5,000, or maybe $6,000 a year. The full-time teacher will have to depend pretty much on his salary for his living. There will be little time for outside employment, and some law schools forbid it.

Mr. Jones, I see you are shocked. I am glad, because the condition is shocking. Is there a remedy for this, you ask? Yes, there is. It lies with you, the general practitioner. The quality of the law schools is the responsibility of the practicing Bar.

What can you do to help? Well, first of all, check your own law school, old Siwash. Go over some day and have a heart-to-heart talk with the dean. Don't let him be evasive—ask him direct questions and get direct answers. Meet the faculty. Size them up.

You say you recall now, that Henry Smith complained of Siwash Law School, because his boy, Henry, Jr., couldn't get a course there in insurance law, and Henry's practice is almost all insurance cases. Did Siwash have enough money to hire an extra instructor to give a course in insurance law? Was their curriculum so arranged that they could give such a course?

Practicing lawyers complain that law school curriculums are not practical; too much time is spent on the Rule in Shelley's Case and similar abstractions, and when the graduates get out they can't even draw a deed or a mortgage. They complain that the courses are not up-to-date; that not enough attention is given to insurance law, zoning, trade regulation, labor relations, taxation, etc. This may be true. Is the method of instruction—the study of many cases—so involved and laborious that the student can't cover all the subjects he should in the three years? Or is too much time devoted to old subjects which have only historical interest, and not enough to present-day problems? If so, whose fault is it?

You would hardly expect to advise the Law School how to arrange their curriculum, you say. Why not? If Henry Smith was dissatisfied with it, do you think you ought to send your boy, Jack, to the same law school without at least asking what courses he will be given? If it isn't the business of Henry Smith and you, and every other practitioner, then whose business is it?

Let me give you this comfort. The money is available. The country is full of it. Foundations are employing experts to find ways to spend their income. Industry needs tax deductions. Your clients, Mr. Jones, can be shown where their donations can serve a worthy and useful purpose—building up old Siwash's endowments, to enable Siwash to hire competent men to teach your son Jack to be a good lawyer.

You ask, isn't the American Bar Association actively interested in these matters? Of course they are and they are doing a great deal of earnest and valuable work, through their Sections and Committees. Not only that; the law schools themselves, through their Association and its committees, in cooperation with the National Conference of Bar Examiners and the American Bar Association, are constantly striving to improve their teaching methods.

Isn't that enough? No, Mr. Jones, it is far from being enough. The Law School Association people are primarily teachers, not practitioners. The American Bar Association, invaluable as its efforts are, reaches only a segment of the practicing lawyers. Only part of the lawyers of America belong to the American Bar Association. Only a part of those who belong take enough interest in the Association's work to go to the meetings; and, of those who do go, only a small part are sufficiently interested to work on the committees.

How about our state association? You're getting closer home, Mr. Jones, but again—only a part, and usually a small part, of the lawyers of each state are actively interested in the meetings and affairs of their state bar association. I grant you that the leadership must come from the American Bar Association and from the state bar associations; but the only place you can reach and influence *all* of the Bar of the United States is at the county level. Every lawyer belongs to his county association and takes an active interest in its meetings and activities. It is at the county level that the needs, aspirations and inadequacies of legal education should be discussed.

The responsibility for providing adequate financing for law schools and proper instruction therein rests with the American practitioners. This has been recognized at "top level" by the American Bar Association, but we must broaden the base of responsibility. It is the business of all lawyers and we must make it the business of every county association in the United States—the responsibility of the whole profession.

Once this fact is brought home to all of the practitioners, the problem is on the way to solution. When this responsibility is recognized, they will meet it.

Irene Erskine

John Leland Mechem has had a wide experience as teacher and practicing lawyer. A native of Michigan, he still maintains his law office in Battle Creek though he withdrew from his law firm in 1951 to devote his time to writing and teaching.

Chief Justice Fred M. Vinson:

Meeting the Challenge to Law and Order

by John J. Parker · *Chief Judge of the United States Court of Appeals for the Fourth Circuit*

■ In the following article, Judge Parker evaluates the work of the late Chief Justice during the turbulent years he sat on the bench of the nation's highest tribunal. The article is taken from an address delivered at the Vinson Memorial exercises held in Washington, D.C., last October.

■ The office of Chief Justice of the United States is a great office and one which requires great qualities of him who would fill it worthily. John Jay chose it when offered by President Washington his choice of positions under the newly created government, and from his day until this it has been filled by men of the first order of ability. We are met to do honor to one who in a time of great danger and crisis rendered signal service to our country in the discharge of its duties. In an address at Cleveland shortly after his appointment, Chief Justice Vinson spoke of the challenge to the supremacy of law. His contribution as Chief Justice was to meet this challenge in a splendid way and by the decisions of the Court over which he presided to make the reign of law more secure throughout the land.

This age of danger and crisis with its challenge to the supremacy of law has been with us now for more than a quarter of a century and great contributions have been made toward the solution of its problems by men who have occupied the office of Chief Justice during that period. Charles E. Hughes reinterpreted basic constitutional principles in the light of changed conditions and thus preserved the integrity of the judicial process and the independence of the judiciary. Harlan F. Stone came to grips with the problem of regulating economic life by governmental power and made possible adequate regulation in the exercise of the democratic process without resort to methods of the totalitarian state. Fred M. Vinson strengthened the arm of the government in dealing with the subversive and disruptive forces which threatened its very existence in the stormy days following the end of World War II.

A Chief Justice must be more than a lawyer. He must be a statesman as well. It is necessary not only that he be familiar with the rules and forms and precedents that are the tools of the legal profession, but also that he thoroughly understand the nature and history of our governmental institutions and the social forces with which they have to deal. Such understanding cannot be taught in the schools. It can come only through first-hand dealing with governmental problems and through long experience of men and affairs on the highest levels of governmental action. Fred Vinson had such experience. Coming to Congress as a young man, he stepped almost immediately into a leading position on the powerful Ways and Means Committee and was recognized as an authority on taxation and public finance. When he left Congress after thirteen years of service to accept appointment to the United States Court of Appeals for the District of Columbia Circuit, the expressions of leaders of both political parties left no doubt that he was universally esteemed as one of the ablest among them. On the Court of Appeals he was soon recognized as one of the great judges of the country and was appointed by Chief Justice Stone to head the Special Court of Appeals created by Congress to deal with the difficult matter of price regulation. After five years of judicial service he was called to serve in the executive branch of the government, first as Director of Economic Stabilization and later as Secretary of the Treasury. Some other Justices, before their appointment to the Supreme Court, had seen service in one or two branches of the government, but no other Justice had served, as had Vinson, in all three of them.

This extended governmental serv-

ice impressed upon Vinson the importance of governmental efficiency and the absolute necessity of the supremacy of law in the life of the nation. I have served with him in the decision of cases in the District of Columbia and for seven years I worked with him as a member of the Judicial Conference of the United States, and I know that no man was more devoted than was he to the American concept of liberty or more conscious of the importance of preserving the great bulwarks for the protection of liberty that have been built up through the years. He was wise enough to know, however, that there could be no true liberty except as supported by law, and that the adequate enforcement of the law was of supreme importance if liberty was to be preserved. He had scant sympathy with those who in the selfish pursuit of personal objectives or doctrinaire advocacy of extreme positions or devotion to foreign ideologies would undermine the foundations of order in the community. His greatest service as Chief Justice was in preserving the strength of our legal structure from impairment by such persons.

The Coal Miners' Case . . . *Firm and Unequivocal Notice*

No one can overestimate the importance of his decision in the coal miners case[1] to the maintenance of peace and order and the preservation of free institutions in this country. The judiciary is the keystone of the arch of constitutional government. If its decrees may be defied with impunity, the whole constitutional structure will crumble. This decision couched in the firm and unequivocal language of the Chief Justice served notice on all men that the decrees of the judiciary could *not* be defied with impunity, that in this country the law is supreme, and the most powerful organizations must obey it. If Vinson had written nothing else, this opinion would entitle him to a place among the great judges of the Court. Like Marshall's decision in *Marbury* v. *Madison*[2] or Taney's in *Ex parte Merryman*,[3] it went to the very foundations of government.

There has been criticism by some persons of Vinson's decisions in the so-called civil rights cases. Of course there has been no criticism by them of his decision in *Shelley* v. *Kraemer*,[4] *Sweatt* v. *Painter*,[5] *McLaurin* v. *Oklahoma State Regents*,[6] or *Oyama* v. *California*,[7] in which he applied the equal protection clause of the Constitution to protect Negroes and Japanese against discriminatory state action. The criticism is directed at decisions which refuse to extend constitutional guarantees to cases to which they were never intended to apply. His attitude in these cases was well summed up in his dissenting opinion in the *Trupiano* case, involving the right of search incident to arrest, wherein he said, "To insist upon the use of search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties".[8]

No better illustration of Vinson's approach to the important matter of efficiency in the administration of the criminal law can be afforded than his action in the *Rosenberg* case. After the defendants there had been convicted of treason and sentenced to death, all sorts of attempts were made to stay execution of the sentence, including an application for stay of execution filed in the Supreme Court on June 15, 1953, which the Court declined to hear.[9] After the Court had adjourned for the term a justice of the Court entered an order staying the execution. The Chief Justice immediately called the Court into special session, considered the question raised upon which the order staying execution had been granted and on June 19 vacated the order.[10] All contentions of the condemned prisoners were thus duly heard and passed upon by the Court, due process was accorded them beyond all question and the delay which would have tended to bring the law into derision and contempt was avoided.

In this case, as in other matters affecting the administration of the criminal law, Vinson showed that he fully appreciated the grave responsibility involved. Maintenance of order is the first duty of government and the maintenance of order rests in the final analysis upon the enforcement of the criminal law. Efficiency in the administration of criminal justice is important at all times; but in the years following the war it has been of more than usual importance because of the fact that communists and fellow travelers have availed themselves of every opportunity to sow discord and dissension, to breed disorder and to paralyze the processes of government by which order is maintained. Vinson understood that only by maintaining efficiency in the processes of our democratic system could we successfully meet the menace of communism, and that nowhere was this efficiency of greater importance than in the processes of justice.

In two cases of outstanding importance Vinson came directly to grips with the menace of communism. In *American Communications Association* v. *Douds*,[11] the validity of the non-communist affidavit requirement of the Labor Management Relations Act[12] was challenged. Vinson, delivering the opinion of the Court, upheld its validity against the contention that it violated the free speech provision of the First Amendment. With respect to this he pithily observed: "That Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and

1. *United States* v. *United Mine Workers*, 330 U. S. 258, 303.
2. 1 Cranch 137.
3. 17 Fed. Cas. 144, Fed. Cas. No. 9,487.
4. 334 U. S. 1.
5. 339 U. S. 629.
6. 339 U. S. 637.
7. 332 U. S. 633.
8. 334 U. S. 699, 714-715.
9. *Rosenberg* v. *Denno*, 346 U. S. 271.
10. *Rosenberg* v. *United States*, 346 U. S. 273.
11. 339 U. S. 382.
12. 61 Stat. 146, 29 U.S.C. 159(h).

present danger that a substantial public evil will result therefrom. It does not require that he be permitted to be the keeper of the arsenal."[13]

In *Dennis* v. *United States*,[14] he wrote the opinion of the Court upholding a conviction under the Smith Act[15] of conspiracy to overthrow the government by force and violence. Again he was confronted with arguments based on the First Amendment and the necessity for applying the "clear and present" danger test of the *Schenck* case.[16] While his argument may not meet the approval of those whose chief concern is to properly "divide a hair twixt west and northwest side", it will commend itself to persons having a practical knowledge of government and governmental problems. He said:

> Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. . . . It is the existence of the conspiracy which creates the danger. . . . If the ingredients of the reaction are present we cannot bind the Government to wait until the catalyst is added.[17]

Clear and Present Danger . . . *A Satisfactory Criterion*

In the absence of conspiracy the "clear and present danger" rule may furnish a satisfactory criterion of criminality in the case of ordinary speeches advocating force and violence but such rule has no practical application to advocacy of violence in connection with conspiracies to overthrow the government, for the danger of such conspiracies is ever "clear and present". They are pregnant with potential evil, which, while hidden from view in normal times, is likely to assert itself as an irresistible force when some national crisis presents an opportunity for a *putsch* or a *coup d'état*.

It was not alone in his opinions, however, and in the influence which they exerted in maintaining the supremacy of law and infusing the judicial process with efficiency that the judicial statesmanship of Fred Vinson was manifested. He was a superb administrator and, as head not only of the Supreme Court but also of the entire federal judicial system, did great work in improving the administration of justice throughout the land. He came to the Supreme Court when that Court was riven and torn by dissensions and animosities until many despaired of its ever being able to function efficiently again; and with his genius for compromise and cooperation he reconciled differences, eliminated discord and did much to restore the Court to the place which it should rightfully occupy in the affections and esteem of the people. As Chairman of the Judicial Conference of the United States he maintained constant oversight over the working of the judicial system throughout the country and drew upon his vast experience to maintain proper liaison with Congress and secure the legislation necessary to properly man the courts and enable them to function with efficiency. One of the last things that he did in this connection was to have the Commission on Administrative Procedure set up with a view to improve the practice before the administrative agencies and tribunals of the federal government where so much of the important business of the people is transacted.

What shall I say of Chief Justice Vinson's philosophy of law and of government? Like most great lawyers, he made no pretense of adherence to any school of philosophy. He knew that law was more than a mere collection of rules and forms and precedents and more than the mere expression of the power of the state, but he knew also that the power of the state was essential to the enforcement of law and to its attaining the status of law as distinguished from ethics or morals. He was not carried away by the transcendentalism of the natural law theorists nor beguiled by the shallow sophistry of the so-called legal realists or pragmatists. If I had to place him, I would say that he belonged with the sociological jurisprudence school of Roscoe Pound. As to his philosophy of government, while a member of the political party of Jefferson, he was distinctly a Hamiltonian in his thinking. He believed that strong and effective governmental power provided the means indispensable to achieve the ends and survival of a political society founded on constitutional principles, and this belief became all the stronger when he saw free societies perish through weakness and ineptitude. It was this philosophy which led to his support of the Government's position in the off-shore oil cases[18] and to his support of challenged exercise of power under the commerce clause.[19] And it was this philosophy, I think, which led him into a dissent which has been much criticised, his dissent in the *Steel Seizure* cases.[20] He thought that in time of emergency the President, pending action by Congress, might act in defense of the nation's interests even though this involved the seizure of private property. To him it was unthinkable that there should be no power in government to prevent such a public catastrophe as would have been involved in the threatened steel strike; and he thought that there was power in the executive, pending action by Congress, to take necessary steps to prevent it. Most of us do not agree with the Chief Justice here because the Federal Government is one of delegated powers and no such power has been delegated to the President in emergencies not calling for the exercise of his powers as Commander in Chief of the Army and Navy. If,

(Continued on page 363)

13. 339 U. S. 382, 389.
14. 341 U. S. 494.
15. 54 Stat. 671, 62 Stat. 808, 18 U.S.C. 2385.
16. 249 U. S. 47.
17. 341 U. S. 494, 509-511.
18. *United States* v. *California*, 332 U. S. 19.
19. *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422 (1947); *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70 (1947) (Vinson, C. J. dissenting); *Interstate Natural Gas Co. Inc.*, v. *Federal Power Comn.*, 331 U. S. 682 (1947); *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948) (Vinson, C. J. dissenting).
20. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 667.

Group Life Insurance Plan

for Members of the American Bar Association

■ I have been requested to write for the JOURNAL a brief outline of the Group Life Insurance Plan shortly to be submitted in definitive form to the eligible membership of the Association for enrollment.

The Special Committee for the American Bar Association on Group Life Insurance has been engaged for the past eighteen months in developing such a plan, and fortunately has been able to negotiate with the New York Life Insurance Company for a group life insurance program substantially more favorable than the original plan submitted to the members of the Association last fall. The response to the questionnaire then sent out indicated that a substantial portion of the membership is interested in proceeding with the group life insurance plan. On that basis, the plan is to be submitted for consideration. It will be remembered that the original plan proposed $2,000 worth of group life insurance to all participating members under age 56, at a total premium of $20 per year, $1,000 of which was to be payable for the benefit of the American Bar Center and $1,000 of which was to be payable to a beneficiary named by the insured member.

The modified plan which after prolonged negotiations is now offered by the New York Life Insurance Company provides for maximum group life insurance coverage of $6,000 for all eligible members at the age of 25 or less, decreasing at the rate of $200 per year until age 45, then at the rate of $100 per year thereafter until termination at age 56. The sum of $1,000 of such insurance is proposed to be payable on the death of the insured to American Bar Foundation up to the time the insured reaches the age of 45 years; and thereafter to an amount equal to one half of the total benefit. The premium to be payable while the insurance is in force, regardless of the amount or the age of the insured, is $20 a year per member. No medical examination is required.

This plan, offering as it does so much more life insurance than the original plan to members under 45 years of age, and at very low cost, should appeal most strongly to the membership and particularly to the younger members. It is difficult to see how any man can afford not to take advantage of this opportunity. If regarded only as term insurance it gives for an extended period a substantial amount of desirable protection at low cost. Heretofore, I understand insurance at such low cost has not been available through normal sources. For young men, it affords a unique opportunity to give protec-

Attained Age (at last birthday)	Total Life* Insurance	Benefit Payable to the Insured Member	Benefit payable to American Bar Foundation for benefit of American Bar Center
20	$6,000	$5,000	$1,000
25	6,000	5,000	1,000
30	5,000	4,000	1,000
35	4,000	3,000	1,000
40	3,000	2,000	1,000
45	2,000	1,000	1,000
50	1,500	750	750
55	1,000	500	500
56	0000	000	000

*Amount decreases on insured's birthday.

tion to their families in a substantial amount at an extremely low cost in the years in which the protection of their families is most needed. At the same time, it affords those members an opportunity to help finance at little cost to themselves a part of the activities of the recently completed American Bar Center in Chicago.

The plan makes all dues-paying members of the American Bar Association Endowment (every member of the American Bar Association is a member of the American Bar Association Endowment) who have not reached their fifty-sixth birthdays and who are recorded in the records of the American Bar Association as members thereof, eligible to be included in the Group Life Insurance Plan.

The New York Life Insurance Company will be the contracting insurance carrier, and the American Bar Association Endowment, a nonprofit Illinois corporation, will act as the group policyholder to collect the premiums and remit them to the New York Life Insurance Company. The amount of insurance proposed for each member shall be in accordance with the member's attained age at his last birthday (stated in five-year brackets for sake of simplicity) shown in the table (page 327).

In the event of termination of membership in the American Bar Association, or in the event of attainment of age 56, the insured member may convert his group benefit then in force to a permanent policy at a rate consistent with his then attained age and type of policy which he selects. He would not be required to furnish evidence of insurability.

In the event of total and permanent disability prior to age 56, premiums are to be waived as will be stated in the contract. The policy also provides a "facility of payment" provision—meaning, that in the event of death the New York Life Insurance Company is permitted to pay up to $500 to any person who has incurred expenses in connection with the fatal illness or burial of the member. This provision is valuable in the event the personal beneficiary happens to be a minor.

Should death occur in the early ages where the amount payable to the personal beneficiary is substantial, the proceeds may be paid in other than a lump-sum fashion, as will be provided in the contract under "Optional Modes of Settlement". The portion payable to the American Bar Foundation will always be on a lump-sum basis.

The cost to the insured member, as stated before, will be $20 per year regardless of age or death benefit. To the extent that the $20 annual premium is allocated to the amount of the principal of the policy payable to the American Bar Foundation, this sum will be deductible in computing the federal income tax liability of the insured. Premiums will be payable annually in advance and it is anticipated that new members joining after the effective date will be permitted to pay a pro rata premium depending upon their date of entry. All premiums will be payable to the American Bar Association Endowment in Chicago.

You are all aware of the fine Headquarters and Research Center which was completed last fall at Chicago and of the great service to the profession and to the public that it will be possible for the organized Bar to furnish from that Center. It is the focal point of the lawyers of America. More than 43,000 lawyers and friends of lawyers have contributed a total of more than $1,750,000 since the campaign began in the spring of 1953. The members of the American Bar Association may well be proud of their achievement and by participating in the American Bar Association Endowment Insurance Plan they not only can enjoy the satisfaction of contributing in a modest way to the continuing activities and objectives of the American Bar Center but at the same time can receive low-cost life insurance protection.

One of the features of the plan is expected to be that the American Bar Association Endowment may receive from the New York Life Insurance Company after the policy has been in effect for a year or more, a substantial sum in each year, the amount of which will fluctuate from year to year according to claims' experience. A sufficient sum may be expected, however, to justify the statement that many of the financial needs of the American Bar Center may be supported from this source.

In order to become effective, the plan must cover a minimum of 10,000 individuals of the eligible classes. In addition, no member may become insured until such time as a minimum of 50 per cent of the members in his state elect to join the program.

Because of certain limitations found in the insurance statutes of the States of Ohio and Texas, the American Bar Association Endowment Insurance Plan will not be offered to members residing in those states. However, the American Bar Association is taking this matter under advisement and hopes that such restrictions can be lifted at some future date.

Necessary informative literature and applications are now being prepared in the expectation that material may be placed in the hands of the members giving greater detail than is here stated shortly after or coinciding with this issue of the AMERCAN BAR ASSOCIATION JOURNAL.

If this group life insurance plan is to become effective, it will require the prompt and enthusiastic support of the membership. It is hoped that every member will read the material as soon as it comes to him and that if favorably disposed to become a member of the Plan, such member will sign and return the application promptly so that the requisite minimum of 10,000 insured members and 50 per cent of the membership in a state may be quickly obtained and the plan put into effect without any undue delay.

HAROLD J. GALLAGHER
New York, New York

The Advantages of a Report to Congress by the Chief Justice of the United States

■ The statement that follows was made by President Loyd Wright of the Association before the Senate Committee on the Judiciary on January 25, in support of pending legislation to invite the Chief Justice of the United States to make an annual report to Congress, in person, on the condition of the federal judiciary. Mr. Wright appeared before the Senate committee through authorization of the Administration Committee of the Association.

■ I am here in response to telegraphic invitation to appear before you as President of the American Bar Association to testify concerning our position in reference to the concurrent resolutions pending before the House and the Senate providing in effect that the Chief Justice of the United States shall be invited to address the Congress with respect to the state of the judiciary and related matters.

The policy-making body of the American Bar Association is the House of Delegates. It meets twice yearly. Its next meeting will be February 21 and 22 at Chicago, Illinois. Obviously I have had no opportunity to present this important subject to the House of Delegates of the American Bar Association. I have, however, submitted the matter to what is called the Administration Committee, which in effect is an Executive Committee of the Board of Governors intended to handle emergency matters, such as the consideration of this proposed congressional resolution. I am happy to state that the Administration Committee is unanimously in accord in advocating a permanent provision pursuant to which the Chief Justice of the United States shall each year be invited to address a joint session of the Senate and House of Representatives to advise them, and through them the people of the United States, as to the state of the judiciary and related matters.

The American Bar Association has long felt that there has been a shocking lack of understanding as to the federal judiciary of the United States. We have ever tried and shall always endeavor to utilize every proper means to bring home to the people and to the people's representatives, as well as members of our own profession, that it was contemplated by our forefathers that the federal judiciary would be and continue to be an independent third branch of government on a parity with the executive and legislative branches. The judiciary was removed, as properly it should have been, from political influence, and hence it has had no one to constantly champion in the legislative halls its needs and requirements in order to fully meet the obligations of service imposed upon it by our form of government.

We of the American Bar Association would recommend the proposed concurrent resolution provided it was an annual affair, and of course that the sole purpose would be to have a forum at which the needs of this great arm of government could be made known to the legislative branch, which is wholly responsible for providing the funds with which to carry on. This is not new. For several years the propriety, plausibility and possibility of some means of getting the problems before the Congress and the people in a manner that will attract attention has been discussed between lawyers and judges at many meetings of bar associations. This is the first time that formal action has been proposed and taken, and I would like to stress some of the reasons why we feel that it is imperative for the welfare of the nation that the true situation at all times should be known.

We believe that the present delay in the disposition of civil cases in the United States courts amounts in many instances to a denial of justice to litigants. We believe the contributing factors to this delay are: (1) The terrific increase in case load without commensurate increase in number of judges; (2) The conservatism on the part of the Judicial Conference of the United States in recommending the creation of additional judgeships; (3) The delay in the creation of judgeships when recommended; and (4) The inevitable diminution of the amounts included in the budget estimates for the courts, with consequent denial of adequate facilities and tools, as well as personnel, to efficiently handle the terrific volume of work.

In reference to increase in case load without commensurate increase in number of judges, may I respectfully call your attention to the fact that during the year ending July 1, 1954, the United States District Courts disposed of 93,161 cases, but that this left pending an additional 78,531 cases. It is true that this backlog accumulated over the years, but it is also true that in recent years it is increasing at a higher rate. For example, during the past three years the backlog of criminal cases increased 31 per cent and the backlog of civil cases 23 per cent. This means that the American litigant must wait for justice in the United States courts longer than at any other time in the history of our country.

Perhaps a good illustration of the situation can be pointed out by calling attention to the fact that in 1900 we had in the United States District Courts 23,832 cases filed in the civil and criminal side. There were 101 judges, and the case load per judge was 236. In 1954 a total of 101,269 cases were commenced. There were 251 judges and a case load of 403 per judge. The number of cases increased more than four times, the number of judgeships a little more than twice. A similar situation prevails in the Courts of Appeals.

I assigned as a second cause of our difficulty over-conservatism on the part of the Judicial Conference of the United States in recommending the creation of additional judgeships. These men are not politicians nor politically inclined. Historically they appear before the Congress and recommend additional judgeships only after the case load has begun to overwhelm, rather than in anticipation.

In addition to the fact that there is no sustained championship for the needs of the judiciary, the Congress has been uniformly slow in creating the additional judgeships requested. Since 1945 there have been fifty-seven judgeships created, all of which were recommended by the Judicial Conference, but a bill creating twenty-four additional judgeships was pending in the last Congress and was not enacted. Of the fifty-seven judgeships created since 1945 only six were created during the year in which the recommendation was made, twenty-three not until the following year, nine not until two years later, twelve not until three years later, four not until four years later, and three not until five years later.

There are several causes for this unhappy situation. It generally takes a year or more for the recommendations of the Judicial Conference to be enacted by the Congress, then after the bills are signed by the President there is usually another period of delay in the selection of the appointees, and if there is controversy this may be substantial; and even after the nominations have been made by the President, unhappily, frequently confirmatory action which must be taken by the Senate is delayed. Consequently, by the time the judges are appointed the case load upon which the recommendation was originally based has continued to mount and press until an added need has arisen.

Another element that enters into it, in our opinion, is the fact that the Congress in recent years has been a full-time job. This, Mr. Chairman, you will recall, is one of the reasons we advocated a fair and substantial increase in compensation of the Congress because it is a full-time job. As a consequence, because of the constantly increasing authority assumed by the Federal Government and the necessary legislation in relation thereto, the Congress is so busy that written reports too frequently go unnoticed. It is humanly impossible for a Congressman or a Senator to peruse in detail all of the things that cross his desk. He therefore relies upon the Committee and the Subcommittee, so that ultimately even the full Congress is not fully advised as to the needs of the courts, with the result that inevitably budget requests are diminished, to the end that many courts are presently sitting without the necessary facilities, and in fact in some instances without even courtrooms.

May I respectfully call your attention to the fact that for the fiscal year 1955 the request of the Director of the Administrative Office of the United States Courts for a budget of $31,216,305 was reduced by $1,187,315. The budget figures for the United States Courts of Appeals and District Courts for the fiscal year 1955 were $28,214,525, and this was reduced by $1,019,775. The over-all cost of the federal judiciary is but a slight percentage of the cost of government. It amounted to 1/25 of one per cent in the year 1954. The figures of expenditures for the courts and the government as a whole are, we believe, enlightening. In 1900 the United States courts cost approximately $2,392,574—the Government as a whole $520,860,000 plus. In 1930 the United States courts cost $8,878,000—the Government as a whole approximately $3,642,000,000. In 1940 our courts cost $10,419,000, as compared to the whole cost of government of $9,000,000,000 plus. In 1950 the courts cost $23,967,000—the Government cost $40,000,000,000 plus. In 1953 the courts cost $27,747,000—the Government as a whole $74,592,000,000 plus. In 1954 the United States courts cost $28,362,000 against $67,578,000,000 plus for the Government as a whole.

Putting it another way, the cost of the support of the United States courts was one half of one per cent of the cost of government as a whole in 1900 and has decreased steadily until it was 1/25 of one per cent in 1954 This notwithstanding the terrific increase of case load.

Our hope and our reason for supporting the proposed resolution inviting the Chief Justice of the United States to appear before both Houses of Congress once each session is that we believe that it will result in all of the Congress and all of the people being thoroughly familiar with the business of the courts and of their requirements. The courts are always reluctant to advance their needs. They are undoubtedly perhaps the poorest of salesmen for themselves. Parenthetically, I might say, Mr. Chairman, they are almost as poor salesmen when it comes to salaries

and necessities as are the Senators and Congressmen when dealing with themselves.

And hence if some proper dignified consistent means can be created whereby the actual and future needs of the courts for their efficient operation may be known to the people, we believe that justice will be expedited and made more certain and that the resulting understanding of the people of the functions of the judiciary and the vast amount of work it undertakes will be helpful and wholesome.

It might not be amiss to remind this honorable Subcommittee that the American Bar Association is constantly endeavoring to improve the administration of justice, and that one of the most important objectives is to undertake to see that the functions of the United States courts be understood by the people, that their calendars be kept current, and that their rules be kept modern; and we are for these resolutions because we believe they will aid in the improvement of the administration of justice and the competency of the courts.

The New Revenue Code:

Income Tax Benefits to Inventors

by **Henry Cassorte Smith** • *of the New York Bar (New York)*

▪ This is another in our series of articles on the Internal Revenue Code written by members of the Section of Taxation intended to acquaint members of the Bar generally with some of the important changes in our basic tax law. The Tax Section has many committees and subcommittees that are working hard on proposed new Treasury Regulations; succeeding issues of the Journal will carry articles written by the chairmen of these groups. The entire series on the new Code is being prepared under the supervision of the Publications Committee of the Section, John W. Ervin, Chairman. The committee is anxious to have comments from readers of the Journal on the value of the articles. Comments sent to the Editor, 1155 East Sixtieth Street, Chicago 37, Illinois, will be forwarded to Mr. Ervin.

▪ The Internal Revenue Code of 1954 has been very kind to the inventor, whether professional or amateur, who sells his patents or applications for patents for a lump sum or for a consideration consisting of periodic payments based on the use of or sales of the article covered by the patent.[1] Moreover, these same substantial benefits are extended to the inventor's "angel" who makes such sales, provided the "angel" is neither the employer of the inventor nor within a certain degree of relationship to him.[2] The benefit so conferred in this situation is the privilege of long-term capital gain treatment to the inventor or his financier.[3]

Prior to the enactment of the 1954 Code, an absolute assignment of patent rights by the owner, or even an exclusive license of the right to manufacture, use or sell the invention covered by the patent, could qualify as a "sale or exchange" for tax purposes provided the holder of the patent was an amateur as distinguished from a professional inventor.[4] The Commissioner of Internal Revenue, however, took the position on March 20, 1950, that he would regard such exclusive licenses or assignments (as distinguished from sales for a lump sum payment) as being royalty payments where payment for the property covered by the patent was measured by the production, sale or use of that property or where the payments were to be made over a period coterminous with the transferee's use of the patent.[5] A very recent Revenue Bulletin reaffirms this position with respect to all periods prior to the applicable date of the statute which is the principal subject of this paper.[6]

The House of Representatives' version of H. R. 8300 (the Revenue Act of 1954) gave to the inventor, whether professional or amateur, (but not to his financier) the relief of being able to obtain long-term capital gain provided, however, that any future payments based on the use or production of the property covered by the patent be made over a period not to exceed five years from the date of sale.[7] The Senate

1. Int. Rev. Code (1954) Sec. 1235.
2. *Ibid*, Sec. 1235 (b).
3. *Ibid.*, Sec. 1235 (a).
4. See, for example, *Commissioner* v. *Celanese Corp.*, 140 F. 2d 339 (C. A. of D.C., 1944) and *Edward C. Meyers*, 6 T.C. 258 (1946) and cases cited in Senate Finance Committee Report No. 1622, 83d Cong., 2d Sess. pages 438-9.
5. See Senate Finance Committee Report, *ibid.* page 439; Mimeograph 6490 (1950-1 C.B. 9) and non-acquiescence (1950-1 C.B. 9) in respect of *Edward C. Meyers*, preceding footnote.
6. Revenue Ruling 55-58 (Int. Rev. Bull. No. 5, page 9, January 31, 1955).
7. H.R. 8300, 83d Cong. (2nd Sess). Sec. 1235(a)(2).

Finance Committee dropped the artificial five-year limitation and also extended the long-term capital gains treatment to the financier of the inventor subject to two limitations.

The reasons for this very substantial relief to a special group were, according to the Finance Committee's Report, "To obviate the uncertainty caused by [the] mimeograph [cited in footnote No. 5] and to provide an incentive to inventors to contribute to the welfare of the Nation. . . ."[8]

Under Subsection (a) of Section 1235, as finally enacted, a transfer (other than by gift, inheritance or devise) by any inventor, whether professional or amateur, of property consisting of all substantial rights evidenced by a patent, or an application for a patent, or consisting of an undivided interest therein, shall be considered a long-term capital transaction.[9] Apparently the gain would be long-term regardless of the actual period it was held. Payments will qualify under this new rule even where the amounts to be received by the inventor or his financier are measured by a fixed percentage of the selling price of the patented article or are based on the number of units sold or manufactured.[10]

From the Committee Report it appears that Section 1235 does not apply to rights in an invention other than the monopoly rights of a patent issued by the United States Patent Office. The inventor may transfer his inchoate right in the invention as well as all of his rights in the patent itself. The right transferred may be an undivided interest in the entire patent or an exclusive license agreement provided the inventor has not retained any substantial right under the patent for himself. As the Senate Finance Committee report puts it:[11] "It is the intention of your committee to continue this realistic test, whereby the entire transaction, regardless of formality, should be examined in its factual context to determine whether or not substantially all rights of the owner in the patent property have been released to the transferee rather than recognizing less relevant verbal touchstones." The report goes on to point out[12] that the retention by the inventor of interest in the patent such as a security interest (*e.g.*, a vendor's lien) or reservation of rights in the nature of a condition subsequent (*e.g.*, a forfeiture on account of nonperformance) will not defeat the applicability of this section.

The benefits of this section are limited to individual "holders". Corporations do not qualify. Moreover, the "holder" of the patent must be either the inventor or his financier. The inventor is the individual "whose efforts created" the patent transferred who must be the "first and original" inventor (or joint inventor) within the meaning of Section 31 of Title 35 of the United States Code. The financier of the inventor who may qualify for long-term capital gains treatment, is more elaborately described. He may not be the inventor's employer even though the employer may be the equitable owner of the patent by virtue of the employment relationship.[13] Moreover, the financier must have acquired his interest in the patent for a consideration "in money or money's worth" actually paid to the original inventor prior to the time when the invention is actually reduced to practice.[14] This financing "angel", who has acquired an interest in the patent, may not be related to the inventor within the meaning of Section 267 (b) of the 1954 Code, except that brothers and sisters may qualify.[15]

This advantageous new treatment is not applicable to sales between related taxpayers with the exception of brothers and sisters. For example, the sale of a patent by an individual to a corporation more than 50 per cent of whose stock is owned by him would not qualify.[16]

Apparently the definition in the statute would prevent any loss on the sale of the patent from being taken as an ordinary loss or a short-term capital loss, inasmuch as the statute provides that the transfer shall be considered " . . . the sale or exchange of a capital asset held for more than 6 months. . . ."[17]

This new advantageous treatment on sale of the patent or application for patent is applicable to payments received in 1954 or later years, regardless of the taxable year in which the original sale, assignment or license actually took place.[18]

The Committee Report states that the tax consequences of the sale of patents in years to which the new statute is not applicable or by individuals who do not qualify as "holders" (corporations, for example) are "to be governed by the provisions of existing law as if this section had not been enacted."[19] Under case law prior to the 1954 Code, owners of patents have been allowed capital gains treatment under circumstances not accepted by the Commissioner.[20]

Another interesting benefit given to inventors as well as creators of "artistic work" is the reduction from thirty-six months to twenty-four months in the period during which the inventive or artistic work must have been done (from the beginning to the completion thereof) in order to "spread back" the income derived from the invention or artistic creation (other than income treated as long-term capital gain).[21] The former 80 per cent rule is, however, retained in the revised statute.

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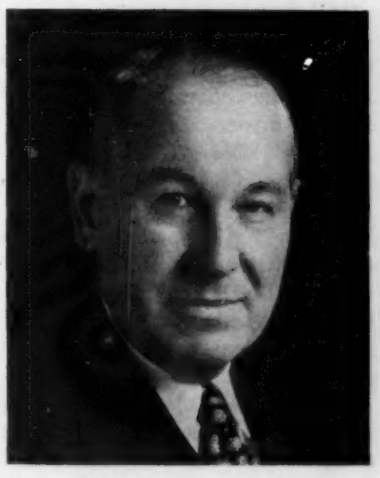
8. Senate Finance Committee Report, *ibid.*, page 439.
9. Section 1235(a).
10. Senate Finance Com. Report, *ibid*, pages 438-9.
11. Report, *ibid.*, page 440.
12. Report, *ibid.*, page 440.
13. Report, *ibid.*, page 440.
14. Int. Rev. Code (1954) Sec. 1235(b)(2).
15. Sec. 1235(b)(2)(B) and (d).
16. Senate Finance Committee Report, *op. cit. supra*, note 4, page 441.
17. Int. Rev. Code (1954) Sec. 1235(a).
18. *Ibid.*, Sec. 1235 (c).
19. Senate Finance Committee Report, *op. cit. supra*, note 4, page 441.
20. See note 4.
21. Int. Rev. Code (1954) Sec. 1302. Compare Section 107(b) of 1939 Code.

Proceedings of the House of Delegates at the 1955 Midyear Meeting in Chicago

The 1955 Midyear Meeting of the House of Delegates of the Association was held at the Edgewater Beach Hotel in Chicago, Illinois, on February 21 and 22. As is our custom, we report here a complete account of the deliberations, including the text of all resolutions adopted. At its first session, the House heard reports of the officers of the Association and considered the creation of several new Sections and Committees, among other business.



John D. Randall
Chairman, House of Delegates

First Session

▪ The opening session of the 1955 Midyear Meeting of the House of Delegates at Chicago, was called to order at 10:00 o'clock on the morning of Monday, February 21, by the Chairman of the House, John D. Randall, of Iowa.

After the roll call by Joseph D. Calhoun, of Pennsylvania, Assistant Secretary of the Association, Glenn M. Coulter, of Michigan, the Chairman of the Committee on Credentials and Admissions, introduced the forty-nine new members of the House. On Mr. Coulter's motion, the House then voted to approve the roster as read at the roll call.

On motion of Joseph D. Stecher, of Ohio, the Secretary of the Association, the House also voted to approve the record of the last meeting of the House at the Annual Meeting in Chicago.

President Loyd Wright, of California, then gave his report. He said that in his many visits to Washington in behalf of the Association since taking office last August, he had found how much the Association is respected by members of Congress. Attorney General Brownell has given the Association "wonderful cooperation", and whenever we have asked for assistance from the White House, we have received it, Mr. Wright said.

Reporting as President of the American Bar Foundation, Mr. Wright announced the resignation of John C. Cooper as Administrator of the Foundation. Mr. Cooper's place will be taken by Whitney R. Harris, who will be both Executive Director of the Association and Administrator of the Foundation after March 1.

Allan H. W. Higgins, of Massachusetts, Chairman of the Foundation's Building Committee, reported that some necessary adjustments were still being made in the Bar Center buildings so that the Committee has not yet accepted the completed plant. He said that he expected to be able to make a final report to the Board of Directors when it meets in Washington in May.

Albert E. Jenner, Jr., of Illinois, Chairman of the Finance Committee of the Foundation, said that the finance campaign had now raised $1,728,181, some $50,000 more than the figures for the month before, and $500,000 since the Atlanta meeting of the House last March. He reported the standing of states that have met their quota as follows (figures as of February 21):

New York	182%
West Virginia	178
Montana	158
Vermont	158
Idaho	140
Illinois	138
Indiana	138
New Mexico	132
Ohio	131
Wyoming	130
Wisconsin	127
Georgia	126
South Dakota	126

Arkansas	125
Oklahoma	122
Texas	119
Delaware	115
Michigan	113
Minnesota	111
Arizona	110
North Dakota	108
California	106
Hawaii	105
District of Columbia	104
New Hampshire	104
Missouri	103
Alabama	102
Iowa	100
Tennessee	100

Mr. Jenner said that there were now sixty-six memorials in the Bar Center. The Finance Committee has adopted the policy of accepting gifts from a partner, or members of the family of a deceased lawyer, or from bar associations. No memorials will be accepted for living lawyers. It is estimated that operating the Bar Center will cost about $150,000 annually, Mr. Jenner reported; his Committee will present a plan for permanent financing at the Annual Meeting in Philadelphia.

Robert G. Storey, of Texas, Chairman of the Research and Library Committee of the Foundation, announced the appointment of John C. Leary, formerly law librarian at Stanford University, as Librarian. Mr. Storey said that five projects for research have been approved: (1) The study of the administration of criminal justice; (2) annotation of the model corporation acts; (3) compilation of the Encyclopedia of Freedoms; (4) restudy and reconsideration of the Canons of Professional Ethics; (5) the Korean Legal Center.

The Korean Legal Center . . . *A Pilot Study for Legal Help*

The last named, Mr. Storey said, was set up after a visit he and Professor Jerome Hall made to Korea at the invitation of President Syngman Rhee. The purpose is to provide a center in Korea with an American law library and facilities for continuing study of Anglo-American constitutional law; the plan will also permit exchange visits of lawyers of Korea and America. Mr. Storey characterized this Korean center as a "pilot study" to determine how American lawyers can aid friendly nations in reestablishing their judicial system and to help them incorporate our principles into their laws.

Harold H. Bredell, of Indiana, then presented the Treasurer's report. Mr. Bredel said that the Association's income so far this year has been much the same as in the same period in the preceding fiscal year, while the expenditures had increased by about $19,000. He explained that, since the Association is in the new Center, no stable overall monthly average expenditures can yet be figured.

He then moved the adoption of the following resolution:

> Be It Resolved, That the portion of sustaining membership dues in excess of regular Association dues, as heretofore appropriated to the building fund pursuant to prior resolutions of this House of Delegates, and any other sums heretofore contributed to the building fund of the Association, shall hereafter be appropriated by the Board of Governors for building maintenance, operation and equipment of the American Bar Center; and
>
> That this resolution shall be applicable to any such sums heretofore collected and still on hand, and to any sums hereafter received.

This resolution was made necessary because the need for a building fund disappeared with the construction of the American Bar Center. It was adopted without debate.

Judge P. Warren Green, of Delaware, reporting for the Budget Committee of the Board of Governors, said that the Association was absolutely solvent and that there was enough money on hand, barring unusual circumstances, to carry on the work for the rest of the year. He stressed the importance of giving good service to members of the Association from the new headquarters.

The House then heard a brief report by the President of the American Law Student Association, Howard W. Pollock, of Houston, Texas. Mr. Pollock told the House about the new program of voluntary life insurance for law students; the program provides $5,000 worth of life insurance for an annual premium of $25, without physical examination and with complete waiver of premium in the event of total disability. The program will be open to members of the Law Student Association, and there will be provisions for converting the insurance to a permanent plan. Mr. Pollock also urged the House to adopt a resolution endorsing the week of August 21-27 as American Law Student Week and suggested that it give consideration to some sort of student membership in the Association. He also told of the Law Book Program of the Student Association, which is procuring donations of law books for use in other countries.

Martin J. Dinkelspiel, of California, Chairman of the Committee on Scope and Correlation of Work, had three resolutions to offer for that Committee.

The first was as follows:

> I. (a) That there be created a Section of Family Law, provided that it be determined, after a survey, that there is sufficient interest in the subject matter to justify such a Section.
>
> (b) If a Section of Family Law is created, it is recommended that the following general subjects be included within its jurisdiction:
>
> Marriage
> Divorce and Annulment
> Maintenance and Support
> Adoptions
> Rights of and Guardianships for Minors and Incompetents
> Youth Correction Laws
> Welfare Problems
> Husband and Wife
> Parent and Child
>
> (c) That if and when a Section of Family Law is established, the Special Committee on Divorce, Marriage Laws and Family Courts be discharged.
>
> (d) That if and when a Section of Family Law is established, the Special Committee on Rights of the Mentally Ill be discharged.
>
> (e) That there be created a Special Committee representative of interested groups to report to the Board on whether there is sufficient interest to support this recommendation.

Paragraph (e) of the resolution was added on the suggestion of Secretary Stecher, speaking for the Board of Governors. The Committee

accepted the amendment.

Justin Miller, of California, Chairman of the Committee on Rights of the Mentally Ill, questioned the wisdom of abolishing that Committee. Many questions of the rights of the mentally ill have nothing to do with family law, he said, and discharging the Special Committee might very well amount to burying a very important subject.

Chairman Randall suggested that that question be considered when and if the Section was established.

The House then voted to adopt the resolution.

The next resolution proposed by Mr. Dinkelspiel would have put the House on record as favoring establishment of a Standing Committee on Constitutional Law with jurisdiction "over all questions arising under or relating to the Constitution of the United States".

In reply to a question from Albert E. Jenner, Jr., of Illinois, Mr. Dinkelspiel said that the work of such a new committee would not interfere with the Committee on Jurisprudence and Law Reform. Mr. Jenner said that the language of the resolution seemed to give the new committee exclusive jurisdiction over everything in the constitutional law field.

There was considerable objection to this proposal, mainly on the ground that the jurisdiction of the proposed Committee was too wide. Thomas N. Tarleau, of New York, Ben R. Miller, of Louisiana; William B. Cudlip, of Michigan; Arthur J. Freund, of Missouri, and Edwin M. Otterbourg, of New York, all participated in the debate. Two amendments to the language of the proposal were offered which tended to cut down the jurisdiction of the proposed new committee. However, the House finally adopted a motion by Whitney North Seymour, of New York, to recommit the recommendation to the Scope and Correlation Committee.

A New Special Committee . . . *Trial and Appellate Practice?*

Mr. Dinkelspiel's third proposal also aroused considerable opposition. It would have put the House on record as favoring the creation of a Special Committee on Trial and Appellate Practice "for the purpose of investigating the desirability of, and, if found desirable, arranging for institutes and panels on trial and appellate practice at Annual and Regional Meetings" of the Association.

George E. Beechwood, of Pennsylvania, Delegate of the Section of Insurance Law, said that the new committee might interfere with the panels sponsored by the Sections and that the Sections themselves were better qualified to arrange such discussions than an over-all group. He moved to recommit the proposal to the Scope and Correlation Committee.

Mr. Dinkelspiel said that there was no intention of interfering with panels sponsored by the Sections, but the idea was to get panels of general interest rather than panels confined to a single subject.

Agreeing with Mr. Beechwood, Allan H. W. Higgins, of Massachusetts, Chairman of the Section of Taxation, said that his Section had found that there was confusion when a local regional committee was appointed to handle an over-all program.

Clifford W. Gardner, of Minnesota, called for adoption of the recommendation. The Committee would eliminate conflicts rather than create them, he argued.

The House then rejected Mr. Beechwood's motion to recommit by a vote of 90 to 64, and adopted the resolution. (This action was reconsidered at the Monday afternoon session. See *infra*.)

The House interrupted its discussion of the report of the Committee on Scope and Correlation to hear from the President of the Association, who informed the members that, with the approval of the Administration Committee, he had invited a well-known actor to appear before the House to give appropriate recognition to two great American presidents whose birthdays occur about the time of the Midyear Meeting. He then presented Mr. Charles Laughton, who read a condensed version of Washington's Farewell Address and delivered Lincoln's Gettysburg Address with superb diction. The members of the House as well as many spectators in the gallery, deeply moved by Mr. Laughton's presentation, applauded him generously and Chairman Randall expressed the Association's appreciation for his contribution to our Midyear Meeting in 1955 and the inspiring reminder it provided of Washington and Lincoln.

Morris B. Mitchell, of Minnesota, speaking for the Committee on Judicial Selection, Tenure and Compensation, of which he is chairman, moved that the following be adopted:

> RESOLVED, That the American Bar Association approves H.R. 2555 of the 84th Congress, introduced by Congressman Hale Boggs of Louisiana, providing that the judges of the United States Court of Military Appeals shall hold office during good behavior, and for other purposes.

Mr. Mitchell said that the House had already gone on record as favoring tenure during good behavior for judges of this court, and the resolution would reaffirm that position. The Bill also provides for increasing the number of judges on the court from three to five. The work load of the court justified this increase, Mr. Mitchell said.

The House voted to adopt the resolution without debate.

Mr. Mitchell reported that it appeared that the Association-endorsed pay raise for Congressmen and federal judges would probably be enacted.

Archibald M. Mull, of California, Chairman of the Membership Committee, reported 54,236 members as of January 31, an all-time high. He said that 2762 new applications had been received since July 1 and called attention to the importance of increasing the number of members. He declared that the goal is 60,000 members by the time of the opening of the Annual Meeting.

The meeting recessed at 12:30 o'clock.

(*Continued on page 373*)

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention

Too Much Business

A recent application by a member of the Bar for an extension of time within which to file a petition for a writ of certiorari yielded a decision worthy of general attention. The late Justice Robert H. Jackson, as Circuit Justice for the Second Circuit, in ruling upon the petition, announced a new judicial attitude toward the grant of extension of time. Warnings are given in the decision (*Knickerbocker Printing Corporation* v. *United States*, 75 S. Ct. 213) which are of vital concern to all trial lawyers. The springboard of the newly announced attitude toward extensions of time is a conviction which Justice Jackson expressed thus: "Delayed justice has become little less than scandalous."

The application for the extension was accompanied with a statement of reasons which Justice Jackson summarized in these words:

> This application gives no reason for an extension other than that the applicant's attorneys "have been actively engaged in the preparation of matters previously scheduled for trial before the United States Court of Claims and the New York State and Federal Courts in New York City." One such case before the Court of Claims is specifically referred to. And it is averred, "The accumulation of matters requiring attention in a busy office such as that of counsel during the period of preparation for trial and the actual trial of the above matter delayed further attention to preparation of petitioner's writ for certiorari here."

Those familiar with appellate practice know that reasons of the above sort are frequently submitted to courts in support of applications for extension of time. Generally, they succeed. We now return to the *Knickerbocker Printing Corporation* decision:

> I do not see how, consistently with our Rule, I can accept counsel's business in lower courts as a reason for extending time to file a petition in this Court. The United States has recently been denied extension in a circuit court upon a similar request. Wolcher v. United States, 9 Cir., 213 F. 2d 539. When more business becomes concentrated in one firm than it can handle, it has two obvious remedies: to put on more legal help, or let some of the business go to offices which have time to attend to it.

The requested extension of time was given, but, in granting it, Justice Jackson announced the new judicial attitude and gave warnings which all must heed:

> I should deny this application but for one consideration. The Revised Rules did not become effective until July 1, and under the old Rules I was notably lenient in granting extensions of time. Perhaps there has not been adequate warning to my Circuit that this policy will not prevail in the future. In view of this lack of warning, I am extending the time for twenty days and asking the New York Law Journal and other Second Circuit publications to give notice to the profession in the Second Circuit that business in the lower courts is not an acceptable reason for extension of time for filing a petition for certiorari in this Court.

A difficulty which haunts appellate practice is the inclination of some attorneys to sidetrack work upon appealed cases for other business. If the attorney represents a defendant, delay serves his client's purposes and, accordingly, no spur drives the attorney to the preparation of the brief. When an attorney shares the time in which he writes an appellate brief with other work that comes to him, the brief will receive spasmodic attention and may suffer in quality. Divided attention upon the part of the lawyer who writes a brief or on the part of a judge who decides a case rarely yields a good result.

The rule announced by Justice Jackson may seem like a harsh one to the attorney who has an accumulation of business, but if it prevents conditions which delay justice none will justly deny its worth. If it drives the lawyer more quickly to the library and to the writing of his brief, we will have better briefs. Better briefs will result in better decisions, and better decisions will yield better law. Justice Jackson put his finger upon an important cause of the delay in the administration of justice. The Bar should readily cooperate.

■ *Bread and Butter for Practical Lawyers*

Lawyers occasionally criticize the AMERICAN BAR ASSOCIATION JOURNAL because, as they say, there are not enough "bread-and-butter" articles in it. Such cursory criticism overlooks the fact that the JOURNAL of a nationwide bar association has not space to carry the obligations of such a publication and at the same time concentrate on the day-to-day problems of practicing lawyers. Your Board of Editors has long sympathetically recognized the need for a practical type of law magazine similar in function to the *Journal of the American Medical Association*. As lawyers all of us realize that such a legal tool can be of great aid in that solving of practical problems by which we earn our daily bread.

This need is to be met by a new publication released this year through the American Law Institute. Its name is *The Practical Lawyer*. *The Practical Lawyer* is a magazine for lawyers engaged in general practice. Its articles will follow the "how-to-do-it" approach. Instead of generalizing about an entire field of law, each article will undertake to deal with a specific practical problem. *The Practical Lawyer* is different from any other type of current legal publication. It does not duplicate the material found in law reviews or our own JOURNAL. It will contain the latest authoritative discussions of those problems of practice which are of current importance to the Bar. In his announcement letter, Judge Herbert F. Goodrich, Director of the American Law Institute says:

> . . . What we are trying to do in *The Practical Lawyer* is not to increase either the breadth or depth of legal scholarship in the United States. That job is being very well done by other publications. What we want to do is to help the man practicing in his office in the problems which confront him from day to day.

In so doing *The Practical Lawyer* will cover in greater detail problems which are glossed over, because of space limitations generally, in the present publications serving the Bar. It will also serve as a medium for keeping current with regular publications of the American Law Institute and of the Committee on Continuing Legal Education.

The Practical Lawyer is a product of the Committee on Continuing Legal Education and its editorial staff. This Committee is a joint committee of the American Law Institute and the American Bar Association. Our members and American lawyers generally should find this new tool of great value in working out their clients' problems. We wish this new arrival well! We share the sentiments so fittingly expressed by George Wharton Pepper in this language launching *The Practical Lawyer* last January:

> . . . The lawyer in active practice knows that the law is something to *do* as well as something to know. He is a fortunate man if he can maintain a just balance between these two aspects of his profession. . . . It may turn out that the contemplated periodical will prove itself an educational instrument of real value. A confident prediction is hazarded that this will prove to be the case.

■ *Progress in Administrative Procedure*

We lawyers have been aggressive in advocating reforms in the field of Administrative Procedure. Our Association was active in securing the passage of the Administrative Procedure Act. In 1953 on the call of President Eisenhower there came into being the Conference on Administrative Procedure. The President's call named three federal judges, twelve practicing lawyers and three federal trial examiners as delegates. Other delegates were designated by various federal administrative agencies. This Conference had the strong personal endorsement of the late Chief Justice Vinson, as well as the enthusiastic approval of Attorney General Brownell. The Conference first met in June, 1953. It was termed at the time "a unique experiment in government". The Conference, under its permanent Chairman, Judge E. Barrett Prettyman, of the United States Court of Appeals for the District of Columbia Circuit, completed its final plenary sessions in November, 1954. Miss Patricia H. Collins, Secretary of the Conference, has written for us a review of the action taken at these final sessions. Her account appears at page 311 of this issue.

The Committees of the Conference indicate the scope of its work. These cover pretrial, pleadings, evidence, trial problems, hearing officers, judicial review, uniform rules and the Office of Federal Administrative Procedure. The agenda of the final sessions of the Conference included such items as the recruitment, compensation and status of federal hearing examiners, as well as such a practical subject as the costs of transcripts of hearings. Our members will be interested in the criticisms of the Civil Service Commission's work in the past and some proposed improvements. The knotty problem of salary grades and ranges of hearing examiners is but one of those the Conference tried to solve. Lawyers will approve the Conference's condemnation of the technique of "risk bidding" used by many reporting companies to saddle the public or the parties involved with the extra cost of transcripts which was paid by the reporting company to the Government in the form of a bonus just to get the contract.

Are uniform rules of administrative procedure a wise policy? Should such a Conference on Administrative Procedure be set up on a permanent basis? Should there be created an independent "Office of Administrative Procedure"? Read Miss Collins' interesting report and learn the answers to these and similar questions which have been bothering you and other lawyers in this crucial field of law.

Officers and Governors Nominated

■ E. Smythe Gambrell, of Atlanta, Georgia, will become the seventy-ninth President of the American Bar Association at the adjournment of the Annual Meeting next August. Mr. Gambrell was nominated for the office by the State Delegates during the Midyear Meeting of the House of Delegates in Chicago, February 21-22.

The State Delegates also nominated Joseph D. Stecher, of Toledo, Ohio, and Harold H. Bredell, of Indianapolis, Indiana, to succeed themselves as Secretary and Treasurer of the Association, respectively.

To fill posts on the Board of Governors for three-year terms, the State Delegates chose Vincent P. McDevitt of Philadelphia, Pennsylvania (Third Circuit), John C. Satterfield, of Jackson, Mississippi (Fifth Circuit), and John Shaw Field, of Reno, Nevada (Ninth Circuit).

Mr. Gambrell

The nominee for President, Mr. Gambrell, has been active for many years in the American Bar Association and the organized Bar of Georgia.

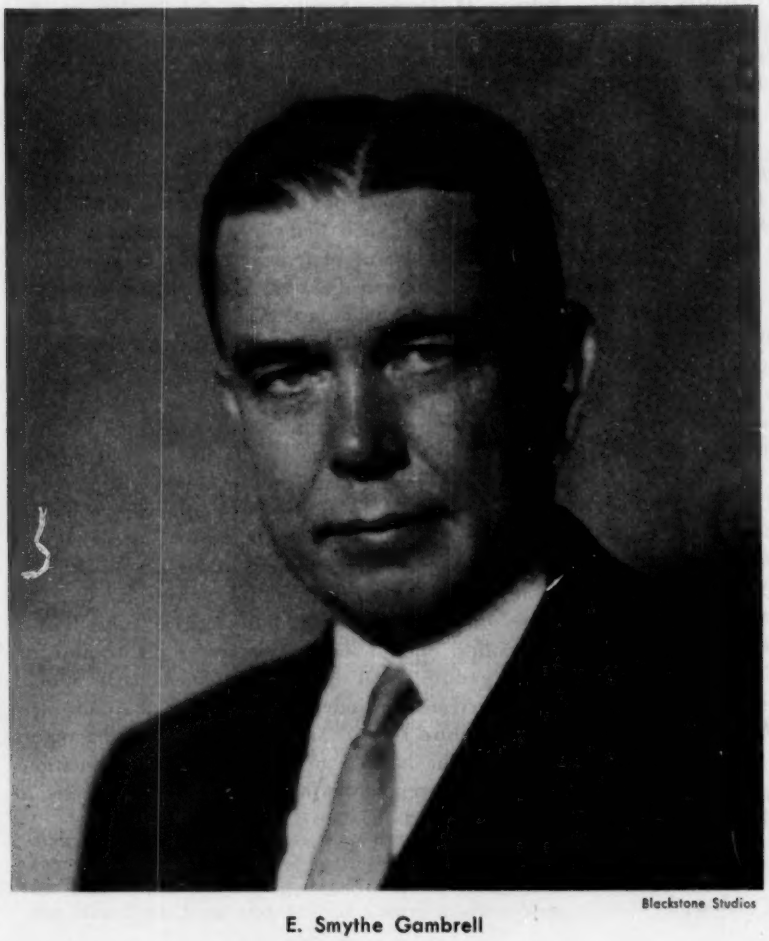
He was Chairman of the Association's Conference of Bar Association Delegates in 1935-1936, and in recent years has made a brilliant record as Chairman of the Committee on Regional Meetings. He is State Delegate from Georgia and has served as Chairman of the Section of Public Utility Law and is a member of the Council of the Section of Antitrust Law.

A native of South Carolina, Mr. Gambrell received his A.B. from the University of South Carolina in 1915 and his LL.B. from Harvard in 1922. He was awarded the degree of LL.D. by the University of South Carolina in 1953. He is a member of Phi Beta Kappa.

In World War I, he served with a machine-gun company of the 324th Infantry, 81st Division, A.E.F.

He has been in the general practice of the law in Atlanta for thirty-three years and is the senior partner of the firm of Gambrell, Harlan, Barwick, Russell and Smith. He is general counsel of Eastern Air Lines Inc., and numerous other corporate and business firms.

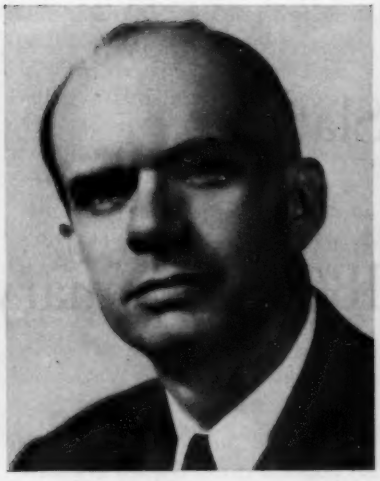
Mr. Gambrell was professor of law at Emory University from 1922 to 1940 and is the founder of the Atlanta Legal Aid Society. He has been President of the Georgia State Chamber of Commerce, is a member of the Board of Trustees of Shorter College, National Secretary of the Harvard Law School Association, and a member of the Georgia State Council of Y.M.C.A. He is Vice President of the American Judicature Society and a member of the Academy of Political Science. He is a member of the Atlanta and Georgia Bar Associations as well as of The Association of



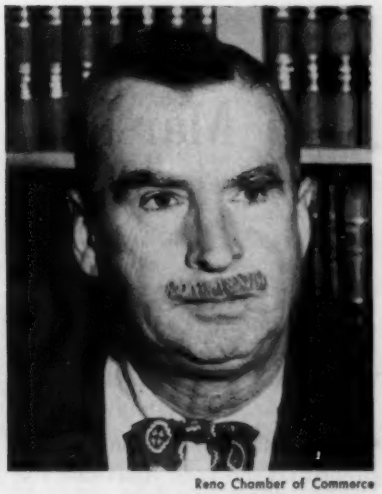
Blackstone Studios

E. Smythe Gambrell

Vincent P. McDevitt



John C. Satterfield



Reno Chamber of Commerce

John Shaw Field

the Bar of the City of New York.

Mr. Gambrell's two sons, Robert H. and David H., are lawyers in his firm; the latter is presently on leave of absence as a member of the Harvard Law School faculty. Mrs. Gambrell died in 1932.

He is a Baptist and a member of Phi Delta Phi and Sigma Alpha Epsilon.

Mr. McDevitt

Vincent P. McDevitt is a native of Philadelphia. Born in 1901, he is a graduate of the West Philadelphia Catholic High School for Boys and attended the Wharton School of the University of Pennsylvania. He received his LL.B. degree from Temple University in 1929. Admitted to the Bar in 1928, he practiced in Philadelphia from 1928 to 1947, when he became General Counsel of the Philadelphia Electric Company and subsidiaries. He is now vice president and general counsel of that company.

He is a member of the Section of Public Utility Law, and a past Chairman of that Section, and is also a member of the Section of International and Comparative Law and of the Section of Taxation. He is the State Delegate from Pennsylvania.

He belongs to the Pennsylvania Bar Association and served two terms on its Executive Committee. He has served on the Board of Governors of the Philadelphia Bar Association and has served as chairman and committee member of several committees of both his state and local association.

Mr. Satterfield

John C. Satterfield is the senior member of the firm of Satterfield, Shell, Williams and Buford, of Jackson, Mississippi. He has been a member of the American Bar Association since he graduated from the University of Mississippi in 1929.

Now entering his third term as State Delegate from Mississippi, he is a member of the Committee on Rules and Calendar, the Committee on Jurisprudence and Law Reform, and of the Committee on Individual Rights as Affected by National Security. He is also Chairman of the Special Committee on Amendment of Rule 71A.

A graduate of Millsaps College, Mr. Satterfield received his legal education at the University of Mississippi. He was a member of the House of Representatives of Mississippi from 1928 to 1932.

A member of the Hinds County Bar Association and the Mississippi State Bar, he has been active in the work of those organizations. He is a former President of the Junior Bar Section and a former Vice President of the Mississippi State Bar.

A Methodist, he served as lay delegate to the 1952 General Conference of the Church in San Francisco and is a member of the General Board of Social and Economic Relations of that Church.

Mr. Satterfield is married and has three children, a son and two daughters. His son, John C. Satterfield, Jr., is now a prelaw student at the University of Mississippi.

Mr. Field

John Shaw Field has maintained his own offices in Reno, Nevada, since his admission to the Bar in 1927. A native of Virginia, he received his education at the University of Virginia.

A member of the Washoe County Bar Association and of the State Bar of Nevada, he has been president of both. In the American Bar Association he has been State Delegate since 1950 and is a former Chairman of the Membership Committee.

During World War I, he served in the submarine division of the Navy.

Under his leadership, as a member of the American Bar Association Advisory Committee on Membership, Nevada has enrolled the largest percentage of members of the Association in the country, with better than 77 per cent of the state's lawyers members of the American Bar Association.

Mr. Field is the first Nevadan to become a member of the Board of Governors.

John Marshall Slaton:

December 25, 1866 — January 11, 1955

■ John Marshall Slaton, distinguished lawyer, great American, sixtieth Governor of Georgia, and one of the American Bar Association's most devoted members, passed from the earthly scene Tuesday morning, January 11.

Born Christmas Day, 1866, in a frugal but cultured home on the family plantation in Meriwether County, Georgia, amidst the ashes left by General Sherman, he developed early the character, courage, strength and wisdom which later were to make him great. His father, Major William F. Slaton, who had served throughout the War Between the States and returned home at its tragic conclusion, moved the family to Atlanta during the grimmest days of the Reconstruction to become Superintendent of the Atlanta Public Schools. Young John Slaton entered Boys High School at the age of 12 and was graduated with honors in 1880 when he was 14.

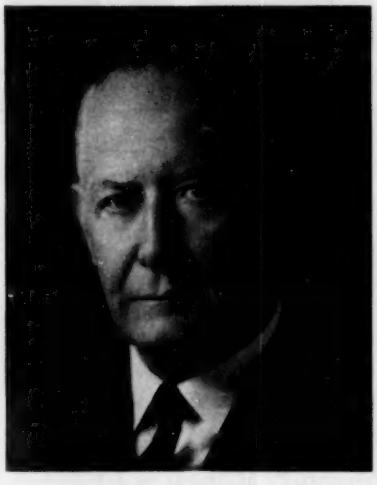
In order to accumulate funds for his higher education, he worked for three years as office boy for lawyers and business establishments and entered the University of Georgia in 1883, graduating with first honors in 1886. A year later he was admitted to the Bar in Atlanta and immediately achieved marked success in the general practice. During his sixty-six years at the Bar he was a member of some of Atlanta's leading firms, a redoubtable and resourceful trial advocate and a wise counselor to the many who sought his advice.

Early in life he became interested in civic and public affairs. In 1896 his political career opened as a member of the Georgia House of Representatives, where he served for thirteen years, the last four as Speaker. He was State Senator and President of the Senate from 1909 until 1913. In his middle forties his political career flowered into the governorship of Georgia for the term 1913-1915.

He had married the queenly Sarah Frances Grant in 1898 and, although this union was never blessed with children, he and she were living in unbounded happiness, greatly beloved in the cultural, professional and civic life of Georgia.

A giant of his day, it was one of destiny's mocking ironies that, in connection with the Leo Frank case, his great integrity should have cost him his political life and that in death he should be remembered best for defying popular clamor and choosing political oblivion in defense of principle. An editorial in the *Atlanta Constitution* for January 12 records this great American epic of character and courage:

> **John Marshall Slaton, 88, a distinguished former governor of Georgia who cast away a great political career rather than abandon principle or truckle to the prejudices and passions of his time, died Tuesday. . . .**
>
> **It was Governor Slaton's destiny, ironic and yet happy, to be confronted with one great test. He was taken, as it were, to the mountain top and offered all that lay below. He was already governor. Ahead of him stretched a sure career in the United States Senate. He knew popularity. No voices were raised against him.**
>
> **And then, on a Sunday morning following Confederate Memorial Day in April of 1913, the cruelly abused body of a 13-year-old girl was found in the basement of a pencil factory in downtown Atlanta. The owner-manager of the plant, Leo Frank, was charged with the crime.**
>
> **The trial was held in an atmosphere of intense excitement, fanned by reckless elements of the press, especially Tom Watson's "Jeffersonian". The Northern press took it up, largely because of the prejudicial statements of Watson's paper, and the ill-advised insistence of some few of Frank's friends that he was innocent, but being framed because of his religion.**
>
> **Frank was convicted and the U.S. Supreme Court sustained the verdict. Two strong dissents, by Justices Hughes and Holmes, plus the statement by the trial judge that he was doubtful, led Governor Slaton, after long study, to commute the sentence to life.**



John Marshall Slaton

He did not hesitate. In a message showing great integrity, he commuted the sentence to life imprisonment. He said in part:

". . . The performance of my duty under the Constitution is a matter of my conscience . . . I can endure misconstruction, abuse and condemnation, but I cannot stand the constant companionship of an accusing conscience which would remind me that I, as governor of Georgia, failed to do what I thought to be right."

It was necessary to call out troops, the Governor's Horse Guards, and for the governor's friends to arm themselves for his protection.

Later a mob killed Frank.

Governor Slaton lived out a full rich life, having fun, going to parties with his nieces and nephews, practicing law, teaching Sunday School.

He was that rare independent man in modern politics—putting principle and integrity above gain and ambition.

He continued active membership in cultural, religious, civic, patriotic and social organizations. He was Chairman of the Board of Stewards of Trinity Methodist Church and for more than fifty years was teacher of the Bible Class which bore his name. He wore the ribbon of the French Legion of Honor and was a member of the Society of the Colonial Wars and of the Sons of the American Revolution.

In 1925 the Supreme Court of Georgia appointed him Chairman of the State Board of Bar Examiners on which he served for twenty-nine years. In 1928 he was unanimously elected President of the Georgia Bar Association. He enjoyed the work and fellowship of the American Bar Association, where he served as Georgia State Delegate, Georgia Bar Association Delegate and member of its Board of Governors.

His ever gracious and lovely helpmate had been at his side until her death in 1945. Although that cruel blow took him to her grave at the dawn of each new day for a decade, it did not overwhelm him. He shrugged off the advancing years and enjoyed the companionship of younger men and women. When infirmities finally came, he took his doctor and nurse on flights to American Bar Association meetings at distant places to continue the performance of his duties and to hold on to the many friendships and associations he so dearly cherished in the national organization. Until the day before his passing, he planned to attend the February meeting in Chicago.

For forty years after he went to his political golgotha, unembittered he found happiness in mingling and working with the people of his native state and beyond its borders. He demonstrated that the austerities of living are not incompatible with the courtesies and sweetness of life. Mixed with his courage, ruggedness and unyielding integrity were courtliness, gallantry, gayety and charm.

John Marshall Slaton did not live in vain; and he lived long enough to see that which destroyed his public career bring about his beatification.

E. Smythe Gambrell

Atlanta, Georgia

The Traffic Court Program

▪ The Traffic Court Program of the American Bar Association, in cooperation with the Northwestern University Traffic Institute and the Traffic Division of the International Association of Chiefs of Police, is conducting field service studies for city and state governments so as to assist them in developing adequate programs in traffic safety.

Purpose of Coordinated Field Service. The underlying purpose of the field service program is to provide assistance to city and state governments in the development of adequate programs in traffic safety.

The Problem. The techniques, methods and procedures—administrative, operational, and technical—for launching a successful attack on the traffic problems of cities and states are already known. They are available to all government agencies—city and state—with responsibilities in traffic.

What is *needed* is direct and sustained application of this "arsenal of traffic safety" to actual, concrete problems. To make this application—specifically, to bring your state and city the best knowledge and techniques available in the field—direct field service is required.

It Pays. Field service has already brought to many governments and government agencies the kind of direct assistance that brings reductions in accidents and marked, over-all improvement in the effectiveness of traffic supervision.

Consultation Without Cost. The field services are available either in part or on a complete, coordinated basis. This coordination is made possible by the voluntary cooperation of the Traffic Institute, the American Bar Association and the International Association of Chiefs of Police. The staff of the Traffic Court Program is available for consultation on problems relating to traffic courts. The chief purpose of such consultation is to evaluate existing official activity, and to come to general conclusions concerning the need for field service assistance.

A brochure describing in further detail the nature of the field service is available upon request from the Traffic Court Program, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois.

A Three-Man Panel Discussion:

The Role of the Lawyer in Labor Relations

■ The discussion below presents three different points of view of the role of the lawyer in labor relations: Professor Lon L. Fuller speaks as a teacher and a member of the legal profession; William G. Caples is a member of the Bar, but his experience has been that of a businessman and officer of one of the nation's larger steel companies; Thomas J. Haggerty, Secretary-Treasurer of the Milk Wagon Drivers' Union, presents the views of organized labor. The panel discussion took place at a session of the Section of Labor Relations Law in Chicago last August.

By Lon L. Fuller
Harvard Law School

■ In discussing the lawyer's contribution to labor relations I am going to skip over with very brief mention the most obvious contribution he can make: namely, a knowledge of the law. I do this not because this contribution is unimportant, but because there seems to be no particular controversy about the proposition that if you want to get the law straight, the man to see is a lawyer.

Nor do I need to stress the fact that mistakes of law in the labor field can be very costly. They can be costly in dollars and cents, running up the labor costs of the employer unexpectedly, or disappointing the financial expectations of the members of a union. They can also be very costly both to management and to labor, in less tangible ways, by disrupting morale, by visiting unexpected windfalls on one group of employees while others receive no similar benefit, by attaching the stigma of a violation of law to acts that were in fact committed through ignorance or inadvertence.

Despite the entanglement of statutes and regulations within which we now must operate, the most important law of labor relations still lies in the common law of the arbitration award. Does the lawyer have any special qualifications for interpreting this "law", that is, for predicting in advance how disputes submitted to arbitration will be decided? It might seem that he would not, particularly in view of the fact that a great many arbitration awards are rendered by men without legal training. It might be said that if you want to get inside the mind of an economist, the thing to do is to hire another economist, not a lawyer.

But I think this overlooks one of the lawyer's chief qualifications for being useful in the labor field. From the first year of law school on, the lawyer has been trained to look at both sides of a controversy. Even as a partisan advocate he must constantly try to see the case from the viewpoint of his opponent; if he fails in this he will be confronted with arguments for which he is unprepared. After a labor dispute has been submitted to arbitration and the evidence is all in, I do not think there is likely to be a very great difference between the reaction of the lawyer and the layman, assuming that each has an equal experience in labor relations. But I think the lawyer is much more apt to be able to anticipate in advance how the case will look after it has been argued. This kind of expertness represents an important contribution that the lawyer's training can make to labor relations. It means that he can not only help advance the interest of his client, but he can also contribute to the public interest by avoiding needless arbitrations.

If a group of laymen were to found a new republic on some hitherto uninhabited island in the Pacific, their first task would be to draw up a constitution. I am sure they would feel more comfortable about this task if they had a lawyer on their drafting committee, preferably as chairman. Why should this be? A lawyer has often been defined as an expert in the rules of an existing government, as a man who can predict, better than others, where the axe of governmental power will strike. But here on our desert island there is no government and no law; the task is to bring into existence a law-making machinery. What are the lawyer's special qualifications for this task?

We might answer very simply: this is a job of drafting, and the lawyer is, or should be, an expert draftsman. But this is a very inadequate answer unless we give an un-

usually broad definition to draftsmanship. Preceding the stage of putting words down on paper, there is the stage of planning the framework of government that is to be expressed by those words. The special competence of the lawyer in devising a constitution lies in the fact that he is experienced in designing arrangements by which human relations are put in workable order. It is precisely this competence that makes the lawyer useful in working out the ground plan of a collective bargaining agreement, just as it makes him useful in planning and drafting a statute, a consent decree, a contract or a will.

I am not so foolish as to assert that good labor relations are guaranteed by a well-thought-out and well-drafted agreement; nor would I pretend that good labor relations cannot possibly exist under a sloppily drawn contract. All I mean to say is that poor planning and poor draftsmanship put an unnecessary strain on labor relations which can easily become unbearable, and that the lawyer is a useful fellow in removing that strain.

Again, I think the lawyer's training for this job begins in the first year of law school. Here he witnesses, and vicariously participates in, the age-old struggle of the common law to keep its house in order, to make some kind of workable whole out of what threatens at all times to degenerate into a hodgepodge of discordant and isolated decisions. The lawyer's professional bias is toward order and unity, toward coherence and internal consistency, toward putting things together in an articulated whole.

The late Elton Mayo of the Harvard Business School said that lawyers are subject to an occupational disease which he called "over-thinking" their problems. He even claimed that by a process of selection, the students who are attracted by legal studies are those constitutionally inclined toward "over-thinking". Perhaps this is so, but I think we can stand a little over-thinking to counteract some of the "under-thinking" that goes on around us. There is certainly plenty of the latter commodity in the labor field, some of which is sold at rather fancy prices under such names as "Industrial Relations Counseling" and the like.

By these remarks I do not mean to suggest that a collective bargaining agreement should be drafted in the same spirit as a corporate indenture. The wise lawyer adjusts his draftsmanship to the problem at hand. This is true even as to business agreements. In one context an informal exchange of letters may be appropriate; another context may demand a carefully drafted document with numbered paragraphs and a blue cover.

The lawyer can also make an important contribution to labor relations by serving as a guardian of due process. I do not use the term "due process" in any technical sense. I mean all those forms of orderly procedure the integrity of which must be maintained if the parties' relationship is to be successful in the long run.

We all know, for example, that arbitration is sometimes used (I would say, abused) for the purpose of rendering palatable what is in fact an agreed settlement. I do not think I need to spell out the circumstances under which there arises a strong temptation to make this use of the arbitration procedure. Aside from the distasteful hypocrisy involved, this misuse of the arbitration process will, if persisted in, eventually undermine the moral force of arbitration itself. When it comes to be assumed all around that most arbitration awards are agreed on in advance, or are half agreed on, then the time will come when there will be a need for what may be called "real" arbitration, when the opposition of interests is genuine and no agreement is in fact possible. When that case arises it may be discovered that the long-continued misuse of arbitration has sapped its strength; that it has lost its power to control the minds and actions of men. You may rub the lamp as hard as you please, but the genii will not appear.

Lon L. Fuller is Carter Professor of General Jurisprudence at the Harvard Law School. He practiced with a Boston firm from 1942 to 1945, devoting much of his time to labor problems. Since 1947, he has served from time to time as an arbitrator in labor disputes.

In my own experience I have found the lawyer generally much more aware of the dangers of such short-cuts than are professed experts in labor relations who lack legal training. If I am right in this, and in my own view about the undermining effect of this sort of exploitation and misuse of procedural forms, then there is here presented a further opportunity for the lawyer to make an important contribution to labor relations.

A sociologist recently published a remarkable article in which he exposed candidly the sociologist's internal struggle with himself. His basic difficulty arises from the fact that he cannot count on public acceptance of the notion that he has any special competence, that his Ph.D. means anything more than that he has passed certain examinations. Out of this insecurity, the writer suggested, arises the yearning for an impressive vocabulary of technical terms, and the insistence that sociology is the only truly "scientific" theory of human behavior in society. The writer might have added that this same insecurity deprives the so-

ciologist, when he turns labor expert, of that independence which membership in an accepted profession confers.

The lawyer, on the other hand, comes to the labor field, as one who belongs to an ancient, recognized and accepted calling. This gives him a power that is capable of being applied very usefully, as well as very harmfully. I shall mention here chiefly the beneficial uses of this power. In this connection I think we have to make a distinction between the lawyer representing management and the lawyer representing a union.

One of the great handicaps the American corporation has in dealing with labor relations lies in the clogging up of the lines of communication. Though communication "through channels" is not the fetish it is in the military, there is a strong tendency to insist on it, and the result is an inevitable distortion of the relevant facts. Say, for example, Joe Doakes is discharged for some misconduct. The company representative most immediately in contact with the facts is, of course, usually Doakes' foreman. But when this foreman reports to his superior, without conscious falsification he is almost certain to bring the facts into such a perspective that it will appear that he, the foreman, has acted throughout strictly in accordance with company policy. (A most unlikely event incidentally.) When the foreman's superior reports to *his* superior, a second and similar readjustment of the facts takes place. When the facts finally reach the head office they are often hardly recognizable by those who knew them first hand. This is why it is so common for companies to be less well-prepared on the facts than union representatives are.

Here is a significant opportunity for real service by the lawyer. Without any threat to corporate morale, he can cut through the hierarchic lines of communication and find out what really happened. In my experience, house counsel is somewhat less able to do this than a lawyer coming from outside the corporation, but even the house counsel is fortified and has his effectiveness in this respect enhanced by the fact that he belongs to a distinct and recognized profession.

The lawyer for the union has, in my experience, a somewhat different contribution to make. Here there is not so much a problem of clogged-up lines of communication as of an emotional involvement in the controversy that obscures the judgment of the participants. They may be so certain they are right that it never enters their minds to analyze what arguments can be made for the other side. The lawyer, by going over their case with them and calmly discussing the arguments that will have to be met, can often avoid a needless arbitration or at least pave the way for an acceptance of an adverse decision.

Then there is the case—and this one affects the company and the union in about the same way—where the dispute is going to arbitration because someone has made a mistake and is unwilling to admit it. Often a fair-minded and objective observer would be certain how such a case would be decided, but the natural tendency to save face (which we Americans still blindly suppose to be something that exists only in the Orient) will make it difficult to settle the controversy without the aid of some outsider who brings to it a fresh viewpoint and the prestige of a professional standing.

The Negative Side

There is no doubt that the lawyer can do much harm in labor relations. The very powers and capacities that I have just described as arising out of his professional training and experience are capable of being applied to bad as well as to good ends. Even with the best of intentions, a lawyer can do a lot of harm in labor relations, where he breaks into that field all at once, without any advance training, or apprenticeship, or coaching from the side lines by another lawyer experienced in the field. I have been arguing that being a lawyer opens up opportunities for service in the field of labor relations that would otherwise be closed; I have nowhere argued that merely being a lawyer makes a man a good labor lawyer.

I would not favor the creation of a special labor law Bar as a means of preventing the kind of damage that can be done by the lawyer who comes into the labor field without previous training or experience. I think the remedy lies in more informal measures, in an appeal to the good judgment of the lawyer who wants to enter this field, and in an education of the Bar generally which will enable lawyers to see that this is a field demanding special qualifications. In fact, I find that nowadays when a lawyer comes into this field he generally does so through a kind of apprenticeship, or is being guided by some friend or partner who is experienced in labor practice.

Quite aside from the damage done by the novice, I think it has to be conceded that some damage—indeed, much damage—is done by lawyers who have in fact been exposed to a good deal of labor experience. In my opinion, that damage is not generally the result of what is called a "legalistic approach". If one means by this term a crabbed and word-bound interpretation of the terms of contract, rather than an interpretation in terms of spirit and aim, then I do not find a tendency to any such "legalistic" interpretation among lawyers experienced in labor relations. Indeed, I am inclined to think that just as every Britisher is alleged to be born a little liberal or else a little conservative, the tendency to "legalistic" interpretations is a matter of innate disposition; it lies in the genes, not in previous training or experience. Some of the most legalistic arguments I have ever listened to have come from men without legal training.

The greatest damage in labor relations is done, I believe, by lawyers who feel compelled to act out a role expected of them by their clients. It would not be so bad if the client really figured out in a rational and calculating way what he wanted done,

and then hired a lawyer to do it for him. This is not what happens. Rather, the client has certain vague anticipations about lawyers, and he believes that to get his money's worth he ought to have a lawyer who will act up to these anticipations. It is not a matter of rational calculation at all. Lawyers are supposed to be bold, self-possessed, challenging, blustering fellows who never give an inch without slyly gaining a mile on the side. This is a picture imbedded in the public mind from courtroom scenes in the movies and on the stage, and it is a picture that is very firmly lodged in many clients' heads. Too many lawyers, in my opinion, feel they have to play up to that role.

One of my friends in Boston says the secret of the successful practice of law lies in "client control". Certainly we would all agree that this problem is acute in the labor field. I do not recommend that the lawyer ride roughshod over his client's wishes. He must find some kind of middle ground. On the one side lies a servile subjection to the client's often uninformed notion of the lawyer's function, a subjection in which all of the dignity and usefulness of a proud profession is lost. On the other side lies a haughty disdain for the client's own understanding of his interests, and an unwillingness to educate him into a better appreciation of what those interests really are. Between these extremes, I think, lies the real usefulness of the lawyer in labor relations. To help the lawyer take this middle course, I think all of us have the obligation, individually and collectively, to do what we can to educate the public to the true nature of the services rendered by the lawyer in the labor field, so that the lawyer will not be under pressure to play up to a role in which he does not genuinely believe.

Fabian Bachrach

William G. Caples is Vice President of Inland Steel Company in charge of personnel. Before World War II, he practiced law in Chicago and later was general attorney of the Continental Casualty Company and vice president of National Casualty Company of Detroit. During the war, he served as a lieutenant colonel in the Corps of Engineers in the Pacific, commanding the 1881st Engineer Aviation Battalion.

By William G. Caples
Chicago, Illinois

■ In setting forth my view of the role of the lawyer in labor relations, it is only fair to indicate my bias. I have been legally educated and engaged in the practice of law for a short period of time. From the point of time this was a relatively small part of my business experience and was long enough ago that to be termed a lawyer today is merely a matter of courtesy on the part of the person making the determination. I think it would be more accurate to say that I view this matter from the standpoint of a manufacturer rather than as a lawyer.

My other bias is that the most effective form of legal assistance is by outside counsel. I tend to the view that internal or house counsel with age and experience tend to become timid in action and narrow in view. A view confined to a single enterprise, no matter how large, is a narrow view of the business community as a whole. The problems that arise in the single company may be unique to it and its counsel but may be an old story with a simple solution to the lawyer who has many clients in many trades and who has a view of a large segment of the business community. My further remarks, therefore, will be confined to the lawyer in the general practice of law and will reflect these biases.

Anyone who enters into the field of labor relations as a specialty—no one in a supervisory capacity in business can avoid it as a part of his duties—needs to have certain basic knowledge. In my opinion, he should have a reasonable working knowledge of the history of the trade union movement in the United States and such other countries as his company may do business in. It is preferable, although not essential, that he have some knowledge of the trade union movement in Europe and Great Britain. This history would not be complete without knowledge of the legal struggle that was engaged in between business and organized labor as the society changed with growing industrialization. Against this broad background a person should know the actions and make-up of state and federal boards which have jurisdiction in the areas in which his company does business, as well as the actions and make-up of the National Labor Relations Board. He should know of the charter or constitution under which the union with which he deals does business and he should be familiar with the union's long- and short-term objectives as expressed in their conventions and the public utterances of their officers. He should know the local bargaining habits of the union and the people who represent it. He should know those things in which the local union representative may have some latitude at the bargaining table and those things which are so rigidly controlled by an international union in some far away city that the local bargaining representative is helpless to make any decision or move regarding them.

These things can be known and generally are known by the people in

large enterprises who have the advantage of being able to specialize in the field and devote their whole time to it. They also have made available to them people trained in law and the various social science fields to enable them to follow the labor movement and to keep themselves constantly and currently advised. In other words, in situations where these people enter into negotiations with the representatives of organized labor it is the case of a professional dealing with a professional and it makes for an extremely interesting conflict and experience for the parties involved.

For the small manufacturer there is no time to similarly prepare himself. He often must be his own manufacturing head, his purchasing agent, salesman, office manager, for it is rarely that he has duties in less than several areas and the work involved in these various areas is so time-consuming that he can barely do them all justice. To expect him to walk into a bargaining conference as fully prepared as the trade unionist on the other side of the table who spends 365 days a year in bargaining, and adequately hold up his end of the bargaining is, in my opinion, a naïve view.

A fair analogy would be in the field of sports, comparing a contest of amateurs and professionals, in which one expected the amateurs to win consistently. The amateur may win occasionally but the chances are that the man who makes it his life work and who has made it his means of livelihood because of his proficiency will win most of the time.

I, therefore, believe that if a small manufacturer is to bargain on anything like even terms from a standpoint of bargaining proficiency—and there is no doubt that the union has the greater economic power—then he must hire an expert to represent him. Probably the smallest cost he will bear because of the bargaining is the fee paid to that expert. In my opinion, a lawyer in most instances is the logical expert. I believe the need is great for lawyers in labor relations in large companies as in small, although the role they play does not have the same essentiality. There are other differences.

But a word of warning to both. The lawyer who is a counsel on legal matters and who is present at the bargaining should clearly understand one thing. His role is purely that of an advice giver on the legal aspects of the pending bargaining. The policy of a company is made by the officers or owners responsible for the running of that company and lawyers should not—although I am afraid they too often do—attempt to inject themselves into the policy-making role.

Another thing that a lawyer seems often to lose sight of is that in giving professional advice he should assume his client to be a thinking person who can evaluate that advice and who has the right to accept it or reject it as he sees fit. Again, it is the client who must live with the decision and he will not be too thankful to a lawyer who forces upon him a decision which is proved to be wrong. This is especially true when the lawyer has stepped outside his role as counsel to play the part of executive.

In making these remarks, and having played both roles, I am not unaware of the frustrations that may be caused by this action in the lawyer or the manufacturer. Like most of our frustrations, they are of a type with which we must learn to live if we are going to successfully carry out our roles.

In the actual negotiations what should the role of the lawyer be? In preparation he should have gone over the existing contract, if there is one, with the operating people to a sufficient extent that he knows and understands the problems which they have with the contract. He should realize that insofar as conditions in the shop, processes, methods, rates, crews, etc., are concerned, the people in the shop are probably the possessors of greater knowledge than he. He should make sure—and this calls for the highest diplomacy—that the shop people are sure of the facts which they give. Sometimes like the King in *The King and I*, they too are confused when they find they "are not sure of what they absolutely know". Shop people are sometimes inclined to say what they know rather than make inquiry, and preparation for bargaining is a searching and checking process. Only by this searching and checking can many embarrassing situations at the bargaining table be avoided.

Before the first bargaining session if the lawyer's client is one unfamiliar with his role, he should be as carefully briefed and acclimated to the bargaining atmosphere as a witness is prepared for the atmosphere of the courtroom. To continue the analogy he should be told of the things which may entrap him if he is unbriefed or unwary.

Once at the bargaining table, in my opinion, negotiations as such should be carried on by one man and that man should be the person in the company responsible for the bargaining. The lawyer should be present to advise him, but neither the lawyer nor anyone other than the negotiator should talk unless the negotiator indicates that he wants him to talk. Once a tentative agreement is reached on any point, it is the lawyer's job to write up the agreement.

In the long ago, I used to be a great believer in shop language because it was understood by the people who lived under its rules. I am now convinced that it was not understood by arbitrators and they are the people who ultimately interpret the law of the bargained contract. Sometimes their interpretation of shop language is a frightening thing to behold. Arbitrators seem to understand English as the language is supposed to be understood and they are prone to follow the legal rules of construction. I am sure these are words that I may have to eat at some later date if they come to my colleague's attention. Thus someone who is skilled in draftsmanship should draw up bargaining contracts, piecemeal as they are agreed to. The lawyer, being present at the bargaining discussion, has the feel of the ac-

cord that has been reached and it is more likely that he will correctly state it in the language of the agreement than will the parties themselves.

The lawyer's role does not cease with collective bargaining and the signing of the agreement which is the spectacular and publicized part of collective bargaining. It is my experience that questions of interpretation arise from time to time under any agreement. Again, the advice of a trained person in regard to interpretation is of value. In those situations where interpretation cannot be agreed upon and which ultimately lead to arbitration there comes the problem of by whom and how an arbitration shall be tried. Here, I think, there is no fixed rule regarding the use of a lawyer. In the interpretative and discussion stages prior to arbitration his service is always valuable. Whether the actual arbitration should be handled by an attorney or someone within the company depends almost entirely upon the factual situation.

My statement would not be complete if I did not say what the lawyer should not be in labor relations. He should not be an overcautious adviser.

In dealing in human matters we usually come out better if we act like human beings. To advise a client from excess of caution to follow an unreal pattern of behavior for fear of some unknown ruling will bring more lasting harm to the work relationship than anything else I know.

People in a plant know fairly well the behavior pattern of their managers. They expect them to follow them. The people react more favorably to what they know and expect than to some unnatural pattern. A result which will be lasting will more quickly come—whether peaceably or by strife—if the things are said and done which it is natural for the parties to say or do.

By Thomas J. Haggerty
Secretary-Treasurer,
Milk Wagon Drivers' Union

■ I should like to develop the labor viewpoint solely from my own observations and experience during the past fourteen years as an executive officer of labor unions. You might wonder why I used the plural term. The reason for it is because I have had the opportunity not only to witness the lawyer's role in my own union's programs, but also to participate in other union grievances and negotiations. In my service as chairman of the Grievance Committee for the Chicago Federation of Labor for more than six years—an organization which comprises close to 600,000 members—on numerous occasions the opportunity presented itself when attorneys were present to contribute in one way or another to the success or failure of the meetings.

It would seem, therefore, my part in this panel discussion would be to present my ideas on this subject from a layman's viewpoint. My first approach to the title of "The Role of the Lawyer in Labor Relations" would be to pose the question, "Why the need for same?" This could be quickly answered by looking at industry and saying what's good for general industry should necessarily be good for its employees' protection. You might then apply to each situation which presents itself the layman's definition of law which, to me, is the rule of reason. Numerous situations come to my mind, some where the need is little and others where the need is great.

Despite some of the recent thinking coming out of Washington, which was given great notoriety in the *Wall Street Journal*, that lawyers have no place at the bargaining table, the following would indicate that when the facts are presented, such is not the case. Perhaps many old-line labor leaders might agree with the above statement because of mistrust or past experiences which have shown that lawyers many times confuse, extend and enlarge upon negotiations for other purposes than trying to resolve the issues before them.

Thomas J. Haggerty has been Secretary-Treasurer of the Milk Wagon Drivers Union since 1940 and a member of the Executive Board of the Chicago Federation of Labor since 1942. He is Treasurer of the Dairy Union's Divisions of the International Teamsters for the Midwest, South and Eastern Seaboard and a member of the Chicago Board of Education.

How can you agree there is a lessening of the need for such legal service when the new interpretation of the N.L.R.B., state and federal legislation, which was enacted during the past fourteen years, has been mainly the necessity for a greater use of such legal service? An often-repeated phrase among lawyers that such has been a legal holiday leads many labor leaders to the belief that while necessity is the mother of invention, the New Deal and now the Old Deal have been a heaven on earth financially for the legal profession.

Many small unions have to lean strongly on their legal adviser, in many cases, turning over the entire negotiations to him for handling while they sit in an advisory capacity. Generally, in many other cases, it would depend on the educational qualifications of the union officers, as to whether they were able to cope with the spokesmen from industry. Let us not overlook the old-line labor leader who received his education in the school of hard knocks and who, because he has grown up with the industry that has flourished, knows many of the failings of those on the opposite side of the table. Whenever some arguments are used that might be what he considers hitting below the belt, he will publicly reveal some of these inconsistencies, with the net result that on the next trip to the negotiating table,

a legal spokesman will take over the show for industry. I would say, in most instances where such a person is trustworthy (and that applies to those on both sides of the table), provided he has the confidence of the people he represents, that such legal adviser can perform a valuable service in the role of labor relations counselor.

The lawyer can, in a number of instances, when the negotiations reach a stalemate, stimulate discussion which, if continued around the table, may ultimately consummate the negotiations. His intimate experiences with the many problems which confront the industry can be very helpful in advising his clients as to how far or fast they can proceed in obtaining benefits for their membership. If he commands the respect of the officers and members, his abilities can be utilized to sell the program to the general membership.

The lawyer should not try to take the dominant position in any labor dispute unless he is given that power by his client. If the union officers are in a position to carry on their negotiations with the lawyer's advice but not with his presence, even though the employers have an attorney present, he should feel that such may be the most practical way to fit the occasion and let the outcome determine whether or not that policy meets with success.

Whether some union or public officials believe it or not, because of the better quality of lawyers who are now representing labor in the city locals, state federations and international unions, the role of the lawyer in labor relations is gaining in importance and from all indications, will continue to gain in the future.

ASSOCIATION CALENDAR

REGIONAL MEETINGS

Phoenix, Arizona	**April 13-16, 1955**
Cincinnati, Ohio	**June 8-11, 1955**
St. Paul-Minneapolis, Minnesota	October 12-15, 1955
New Orleans, Louisiana	**November 27-30, 1955**
Hartford, Connecticut	**April 15-18, 1956**

States Included

PHOENIX (Pacific Southwestern Regional Meeting)—Arizona, California, Colorado, Nevada, New Mexico and Utah (Walter E. Craig, General Chairman of Local Committee on Arrangements, Phoenix National Bank Building, Phoenix)

CINCINNATI (Big Seven Regional Meeting)—Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee and West Virginia (Grauman Marks, General Chairman, St. Paul Building, Cincinnati 2)

ST. PAUL-MINNEAPOLIS (Northwestern Regional Meeting)—Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wisconsin (W. W. Gibson, Honorary Chairman, Roanoke Building, Minneapolis 2; Ivan Bowen, Co-Chairman, Rand Tower, Minneapolis 2; John B. Burke, Co-Chairman, Minnesota Federal Building, St. Paul 1) (*Headquarters, St. Paul*)

NEW ORLEANS (Deep South Regional Meeting)—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee and Texas (Cuthbert S. Baldwin, General Chairman, Richards Building, New Orleans 12; P. A. Bienvenu, Chairman of Registration and Hotel Accommodations, American Bank Building, New Orleans 12)

HARTFORD (Northeastern Regional Meeting)—Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island and Vermont (Cyril Coleman, General Chairman, 750 Main Street, Hartford 3)

(For information and reservations, write to the chairmen listed above)

BOARD OF GOVERNORS MEETING

Mayflower Hotel, Washington, D. C. — **May 16 and 17, 1955**

ANNUAL MEETINGS

Philadelphia, Pennsylvania — **August 22-26, 1955**
(Bellevue-Stratford — Headquarters)

Dallas, Texas — **August 27-31, 1956**

Books for Lawyers

MEDIEVAL ESSAYS. *By Christopher Dawson. New York: Sheed and Ward. 1954. $3.50. Pages 271.*

This is a much more timely and important book than its title would at first indicate. At this time, when Western civilization and all that it stands for in political evolution, science, art and religion, is being challenged by forces more powerful and more destructive than ever before, it is of vital importance that we know what Western civilization is, where it came from and how. The forces that inspired and influenced Western culture are much more diverse and varied than is generally known, except by those few who have made a study of the subject.

It is encouraging that an interest in medieval history is being aroused. In addition to the book being reviewed, there have recently been published *History of Christian Philosophy in the Middle Ages,* by Etienne Gilson, and *The Age of Belief: The Medieval Philosophers,* edited by Anne Fremantle, a Mentor book. And the College of Law of the University of Notre Dame has inaugurated a course in the history of the legal profession, in which the student is introduced to the great men of the profession who have advanced the cause of human freedom within the framework of orderly government, with particular attention to the contribution made by lawyers to the rise of Western civilization and the development of Western thought.

No one can understand the sources of our civilization without some understanding of medieval history. The strange thing is that for so many years the study of the medieval period was either completely neglected or studied only in part. College students, if they gave any attention at all to medieval times, were probably instructed only in the disintegration of the Roman Empire and the great migrations of the northern tribes.

At the outset, the author explains that the word "medieval" was coined by post-Renaissance scholars to cover the gap between two periods of positive achievement which were regarded as the only ones worthy of the attention of the educated man—the classical civilization of Greece and Rome and the civilization of modern Europe. But this book is concerned with the interim period between those two civilizations, which the author maintains is the source of the actual sociological unity which we call Europe. The product of that period was Christian culture; but one of the very interesting things in this book is the portrayal of the contribution of Oriental culture and the culture of Western Islam to Western Christian civilization.

The author recognizes three distinct phases in the evolution of Western culture. He says:

> In the first place there is the situation of a new religion in an old culture. This was the situation of Christianity in the Roman Empire of which I write in the essay on "The Age of St. Augustine." This process of conflict and conversion produced the first phase of Christian culture—the society of the Christian Empire and the age of the Fathers. . . .
>
> Secondly there is the situation in which the Church entered the barbarian world not only as the teacher of the Christian Faith but also as the bearer of a higher culture. This double impact of Christian culture on the barbarian world which had its own tradition of culture and its own social institutions produced a state of tension and conflict between two social traditions and two ideals of life which has had a profound influence on the development of Western culture. . . .
>
> In the third place we have the situation in which Christianity inspires a new movement of cultural creativity, in which the new life of the new peoples finds a new expression in consciously Christian forms. This is the medieval synthesis which is the characteristic achievement of the Middle Ages, in the narrower sense of the expression. It would, however, be more correct to describe it as the age of the Western Renaissance for it is essentially the birth of a new world culture.

One of the most interesting and revealing chapters in the book is the essay on "Church and State in the Middle Ages". It clarifies many misconceptions and supplies much information that should be exceedingly helpful in our present crisis. The author says:

> It is impossible to understand the history of the medieval Church, and its relations with the State and to social life in general, if we treat it in the analogy of modern conditions. The Church was not only a far more universal and far-reaching society than the medieval State, it possessed many of the functions that we regard as essentially political.

The separation of church and state was not brought about by activity of the state or of the people, but by the church itself. The author says:

> It was not until the Church had asserted her claim to freedom from secular control that the State became conscious of its proper mission and was able to vindicate its political autonomy.

He points out that the creators of the new state and the new law were themselves for the most part churchmen such as Roger of Salisbury, Hubert Walter and Henry of Bracton in England. Roman law was regarded as more akin to canon law than it was to the customary law of the feudal state. It was a sacred thing, *res sanctissima.* That view of Roman law supported the deep sense of spiritual significance of the unity of Christian civilization under the universal Roman law. It stood in opposition to the separatist tendencies of the different national kingdoms whose existence was founded on force rather than reason or revelation. The unity of humanity based

on Christian civilization and the universality of law based on Roman and natural law, offer today our best hope for world peace. As Dawson says:

> The unitary conception of society is no longer restricted to its historic basis, the actual society of Western Christendom, but is extended to the world in general and to humanity as a whole.

This book reveals that our civilization is much more universal or cosmic than has generally been understood. The extent of its indebtedness to other cultures is astounding. As the author says:

> We are so accustomed to regarding our culture as essentially Western, that it is difficult to remember that there was a time when the most civilized regions of western Europe belonged to an alien oriental culture, and the Mediterranean, the cradle of Latin civilization, was in danger of becoming Arabic.
>
> The eighth century had already seen the Moslem conquest of Spain and the invasion of Aquitaine, but it was not until the ninth that the expansion of the Moslem maritime states drove Christian shipping off the seas and converted the basin of the western Mediterranean into a Saracen lake. The Arabs occupied all the western islands and even established themselves on the mainland of Italy and Provence. . . . Finally, the tenth century saw the rise of the Spanish Khalifate and the development of a brilliant culture and literature in southern and eastern Spain.

The contribution of that culture to our literature and our modern science is completely surprising to those who have thought of the eighth, ninth and tenth centuries as nothing but the Dark Ages.

Mr. Dawson writes of times past and the various influences on our civilization, monasticism, feudalism, Moslem and oriental culture, in an intensely interesting style. As has been said, he is "unequaled as a historian of culture. Unless we read him we are uninformed."

ROBERT N. WILKIN
Charlottesville, Virginia

TRIAL. *By Don Mankiewicz. New York: Harper and Brothers. 1955. $3.50. Pages 306.*

This fictional account of a trial for murder made the best seller list in one short week. It is the 1955 Harper Prize Novel. It has been acclaimed by the critics. Therefore, it is with no little reluctance that this reviewer feels obliged, from the viewpoint of the lawyer, to disagree in part with so many.

The story concerns a 17-year-old, Angel Chavez, who was a hanging victim (under legal auspices) of circumstantial evidence, mob psychology, political ambitions and communist aims.

Trial depicts a scandalizing miscarriage of justice; a lawyer (Bernard Castle), who was not only a Communist worker and a solicitor of law business, but one who was willing to let an innocent boy be executed for the good of "the Party". All this as though it happened almost every day. These excesses of the left are attempted to be offset by the excesses of the right in the person of one Carl Baron Battle (a legislator-investigator of a well-known type).

The principal character, David Blake, a young professor of criminal law trying his first case, is unrealistically tranquil and proficient. Lawyers, recalling the sweat, tears and jitters of their first court experiences, will find Mr. Blake a little too fanciful even for fiction.

The Bar should not complain when one of its members is portrayed as an unethical or even immoral person. We must recognize that lawyers are human and subject to deviation from rectitude, just as are the members of all other professions and vocations. We do object, and strenuously, when the impression is given that the conduct of such a one may be typical. Fortunately, the lawyers of the Castle type are very few—and this is a point the author fails to make although he might well have done so.

This reviewer is not opposed to sex where it has more relevance to the theme. In *Trial,* however, the sex interludes are so far disassociated from the plot as to lead one to the conclusion that they are included to make certain that all the ingredients of successful modern fiction are present.

Mr. Mankiewicz is to be commended for his style. It is terse, tense and fast-moving as befits his theme. His techniques of transition are so adroit that the reader finds no convenient page at which to interrupt the reading. The description of the trial is exciting and as accurate as any lawyer might require.

Trial is recommended reading for all lawyers and judges with low blood pressures.

RICHARD P. TINKHAM
Hammond, Indiana

SCIENCE, THE SUPER-SLEUTH. *By Lynn Poole. New York: Whittlesey House, McGraw Hill Book Company, Inc. 1954. $2.75. Pages 192.*

The author of *Science, the Super-Sleuth,* Lynn Poole, is the producer of the *Johns Hopkins TV Science Review* and the writer of other popular non-fiction in the general field of science. His stated aim was to afford the reader "a fuller understanding of the extent and value of the patient and thorough work done by law enforcement officers who are using every new method to thwart the criminal element, to protect the innocent". In attempting to determine whether Mr. Poole succeeded in this objective, this reviewer not only read the book himself but obtained the reactions (1) of an adult reader who had previously been unfamiliar with any of the scientific methods of crime detection and (2) of a twelve-year-old boy qualified only by an avid interest in "who-done-its" generally. All three of us concluded that the book is a good one. It discusses in simple language such subjects as the identification of firearms, tool marks, fingerprints, footprints; document examination; the lie-detector technique; pathological determinations; and various general applications of the principles of physics and chemistry in criminal investigations.

As may be found in any book of this sort written for laymen, there

are, of course, certain inaccuracies which may offend the technicians in these various fields. They are, however, of a minor nature and certainly will occasion no harm in a book of this type. The technicians may also find fault with a few statements such as the one which appears on page 61 to the effect that "countless cases are on record in which electronic photomicrographs have been submitted to the court". Another overstatement which may be bothersome to a number of readers is the one in which the author ventures to say "Even the great Sherlock Holmes would have been flabbergasted by the multiple uses of the techniques and apparatuses of modern science in the solution of crimes today". Any fan of Sherlock Holmes would want to back author Poole into the corner on that one.

Science, the Super-Sleuth is good reading for anyone, and, incidentally, there is nothing in the book which will be in any way offensive to children, and all of it will be good, interesting reading for young television "who-done-it" fans about the age of twelve. The parents, too, will find the book interesting and worthwhile. It is also something of value for the average policeman. In fact, there is one excellent lesson in the book for the police and even for coroners' physicians who are not well prepared for conducting pathological examinations. That lesson pertains to time-of-death determinations which, contrary to popular belief, cannot be made by looking at or touching a dead body and fixing the time at a precise number of hours prior to its examination.

FRED E. INBAU
Northwestern University School of Law
Chicago, Illinois

CONTRACTS AND CONVEYANCES OF REAL PROPERTY. *By Milton R. Friedman. Chicago: Callaghan and Company. 1954. $10.00. Pages xi, 425.*

The author, a successful practitioner in Connecticut and New York and author of *Preparation of Leases* for the Practising Law Institute, has made in this short volume a real contribution to the conveyancing branch of our profession.

A conveyancer desiring to make rational choices in selection of books for his library has a difficult problem today. He can buy books dealing with abstracts and titles, but these give him little help on the real estate mortgage which so often is part and parcel of the real estate deal and only too frequently are written by a title examiner who regards "record" problems as the only problems. If he buys a mortgage book he will find the bulk of it deals with the intricacies of foreclosure and not with the preparation of a mortgage. If he finds, as he will, that his book on conveyances, titles and mortgages gives him little help on the contract then he may think of a book on contracts. But this will unhelpfully declare the land contract to be governed by the general principles of contract. He may turn to a work on "vendor and purchaser" and find that "the" problems of the land contract are those of "equitable conversion", "bona fide purchase for value", "marketable title" and nothing else.

Mr. Friedman, a conveyancer and not narrowly a title examiner has written a book for the conveyancer. In less than 500 pages he tells us about the formalities of the contract of sale, assignment of the contract, what examination of title includes, about the many specific defects which make title unmarketable, about possession, mortgages, the deed, and the steps in a closing of title. His book is not a compilation of conflicting headnotes, but is an analysis of problems and principles.

The theme of the text is that the contract of sale is everything and that most other problems are matters of construction of this basic instrument. Thus his opening chapter, on the contract, approaches the Statute of Frauds as a question of sufficiency of memorandum not as a problem of "part performance" taking the agreement out of the statute. Even the problem of marketable title is treated as a problem of contract: How should the contract be drawn as to the desired quality of title? Is this defect one within the contract terms?

This is basically a book for the lawyer who deals with the urban lot and not with the farm. This emphasis is desirable because it vividly illustrates that the law of urban land contracts is no more the law of the sale of virgin unimproved land than is the law of sales the law of the horse trade. This needs repetition to the urban lawyer because too often his books and his law school convey the impression that title defect is a term synonymous with dower and future interests and that the only statutes regulating land are those prescribing the form of acknowledgment, the recording system and street vacations. This book treats zoning ordinances, building codes, housing codes and the like as parts of the conveyancer's working tools, equal to the above mentioned problems. Too often one finds lawyers who leave such matters to their client's engineer or real estate agent.

While it is true that New York lawyers, if the number and content of the cases are a true reflection of the situation, seem to contract and dispute concerning matters which others leave to luck or to the unwritten rules of conduct, Mr. Friedman has not let his knowledge stop at the Hudson. Between 30 and 40 per cent of the cases cited are non-New York cases. Furthermore the author is acutely conscious of how much local "ground rules" control the risks which a lawyer lets his client take in a real estate deal. This book does not attempt to delineate these local rules, rather it has done its job if it induces the conveyancer to ask himself whether this is a problem which local ground rules cover or this is a problem of which he was not conscious previously.

Occasionally I found too much New York emphasis as in the treatment of the terms of the mortgage. On the other hand, his full acquaintance with the New York forms of title policies and with the cases interpreting those policies should

make all lawyers who use title insurance re-read the "boiler-plate" clauses in the local policy to determine, in the light of the author's penetrating analysis, what the insurance really covers.

We need more short works such as this for the property lawyer who advises, but is not an advocate.

ALLISON DUNHAM
University of Chicago

SMALL TOWN D.A. *By Robert Traver. New York: E. P. Dutton & Co., Inc. 1954. $3.00 Pages 253.*

In his preface the author says he was District Attorney of Iron Cliffs County, in Michigan's Upper Peninsula, for fourteen years. Atlases do not reveal an Iron Cliffs County in Michigan, but there is an Iron County, and it is in the Upper Peninsula. Michigan, moreoever, does not have D.A.s; it has prosecuting attorneys. But the author prefers D.A. because mass media have popularized that title. Perhaps these things are clues to this book. Indeed, does Robert Traver exist, or is it a pseudonym?

Personal reminiscences and autobiographies can be exceedingly dull (although good history) when they are based on and interlarded with excerpts from correspondence, memoranda and verbatim recording of conversations. No such charge could be made against this book. It is, as the publisher's jacket blurb promises, "drama tempered by humor, vitality edged with gusto". One may sometimes wonder where fact and reality end and embellishment and apocrypha begin.

But no matter. It's a welcome bedside companion that will delight any lawyer, whether he's a D.A., small-towner, urbanite or what-have-you. It's filled with many stories of Mr. Traver's legal adventures in and out of court, the best of which is a tale of blackmail called "Geeve Me De Morgazhe." When Mr. Traver waxes seriously, he has some important things to say about adultery, prisons, policemen and juries.

RICHARD B. ALLEN
Aledo, Illinois

JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER. THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE. *By Donald G. Morgan. Columbia, South Carolina: University of South Carolina Press. 1954. $6.50. Pages 326.*

With the possible exception of Story, we are most likely to think of the early United States Supreme Court as the John Marshall Court and to have the vaguest notions as to the Associate Justices who sat alongside him. The signal achievement of this book is that it serves to fill in one of the judicial robes with a distinct personality who sat for twenty-nine years and displayed vigor and individuality of thought in thirty-two separate dissenting opinions.

William Johnson, of South Carolina, a Princeton graduate, one of the founders of the University of South Carolina, a state judge, though but thirty-two years old in 1804, was picked by Jefferson to help stem the Federalist trend displayed by the prior appointees. He proved to be forthright in his judgment, disregarding the tenets of his President when he disagreed, but rendering close adherence to his fundamental empirical position. We find in his opinions an early Holmes, or, if you prefer, Holmes was a late Johnson.

The author expounds and illustrates the controversies displayed in the cases in which Johnson participated and through which he expressed "a vigorous and challenging philosophy of the Federal Constitution". He disliked the façade of the unanimous opinion, so favored by Marshall, and supported the seriatim opinion, or, at any rate, the dissent. He clearly expressed his idea of the function of the Court and Congress: "Laws have no legal meaning but what is given them by the Courts to whose exposition they are submitted." Yet he recognized that it is Congress that sets the policies and makes the laws and he sought to "prescribe the dominance of the representative legislature".

On the growing controversy over state rights as against federal supremacy, he was among the earliest to foreshadow our current beliefs in cooperative possibilities. For him, "The science of government . . . consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." How Holmesian, or Johnsonian should we say? His leanings were nationalist, despite his Jeffersonianism, but he believed that "State rights or United States' rights are nothing except as they contribute to the safety and happiness of the people." It is interesting to note his application of such views, though a South Carolinian, to the increasing vehemence of nullification arguments.

Johnson expressed concern for free enterprise. He befriended property "but saw the need for legislative regulations dictated by public need". His concern was also for the individual as he believed it is the "humblest individual" that our Constitution protects.

It is also interesting to note that he was not above growth in his own views. Despite an early view to the contrary, his mature opinion opposed a transcendent law of nature and favored controlling positive law.

These are but some of the compelling controversies that stand out in these pages and make of them an important historical record of the early days of our Supreme Court and of our country. As President Wright of Smith College says in his foreward " . . . this thorough study of his life and his judicial career is a contribution of considerable importance to the literature of American history."

LESTER E. DENONN
New York, New York

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

Antitrust Law . . .
Legitimate theatre is subject to the Sherman Act

■ *United States* v. *Shubert,* 348 U.S. 222, 99 L. ed. (Advance p. 213), 75 S. Ct. 277, 23 U.S. Law Week 4074. (No. 31, decided January 31, 1955.) *Judgment of the United States District Court for the Southern District of New York reversed.*

In the first of two civil antitrust suits that attracted front-page attention, the Supreme Court refused to apply the doctrine of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs* to immunize legitimate theatrical productions from the scope of the antitrust laws.

Defendants were engaged in the business of producing legitimate theatrical attractions in theatres throughout the United States. The Government filed a civil action against them under Sections 1 and 2 of the Sherman Act. The district court dismissed the complaint following the Court's decision in *Toolson* v. *New York Yankees,* 346 U.S. 356 (1954).

The opinion of the Supreme Court on direct appeal was delivered by the CHIEF JUSTICE. The Court rested its decision in part on *Hart* v. *B. F. Vaudeville Exchange,* 262 U.S. 271, where Mr. Justice Holmes, only a year after his famous decision in the *Federal Baseball* case, refused to apply the *Federal Baseball* doctrine to the theatrical business.

The Court declared that its decision in *Toolson* v. *New York Yankees* was a narrow application of the rule of *stare decisis,* depending merely on a determination that Congress had not intended to include baseball under the antitrust laws. The Court observed that the *Toolson* case did not necessarily reaffirm all that was said in the *Federal Baseball* opinion, and that it could not convert its *Toolson* holding into a "sweeping grant of immunity to every business based on the live presentation of local exhibitions".

Mr. Justice BURTON announced that he retained the views expressed in his dissent to the *Toolson* case, but joined the opinion and judgment of the Court in this case. Mr. Justice REED concurred in this position.

Mr. Justice MINTON noted that he agreed with the judgment because, on the pleadings, it is controlled by the *Hart* case.

The case was argued by Philip Elman for appellant and by Alfred McCormack for appellees.

Antitrust Law . . .
Professional boxing is subject to the antitrust laws

■ *United States* v. *International Boxing Club of New York, Inc.,* 348 U.S. 236, 99 L. ed. (Advance p. 221), 75 S. Ct. 259, 23 U.S. Law Week 4078. (No. 53, decided January 31, 1955.) *Judgment of the United States District Court for the Southern District of New York reversed.*

In the second round of a civil antitrust suit charging the defendants with violation of the Sherman Act, the Supreme Court struck a decisive blow at an attempt to bring professional boxing into the arena of immunity erected around professional baseball by the *Toolson* case.

The first round had gone to the defendants by a decision of the District Court which dismissed the Sherman Act complaint on the strength of the *Toolson* decision and its ancestor, the *Federal Baseball* case. Appellees were promoters of professional championship boxing contests, charged with violation of Sections 1 and 2 of the Sherman Act.

The opinion of the Supreme Court was delivered by the CHIEF JUSTICE. The Court declared that, but for the *Toolson* and *Federal Baseball* opinions, "it would be too clear for dispute" that the Government's allegations brought defendants within the scope of the Sherman Act. Using the same reasoning that it adopted in the *Shubert* case, *supra,* the Court declared that *Toolson* was not an authority for exempting other businesses from the application of the antitrust laws merely because they are based, like baseball, on the performance of local exhibitions. The *Toolson* decision was predicated on congressional failure to bring professional baseball under the antitrust statutes during the thirty years that passed between the *Federal Baseball* and the *Toolson* decisions, the Court said. The issue of exempting all sports from the antitrust laws had been rejected after extensive committee hearings when bills had been introduced in Congress providing for such an exemption. The Court declared that defendants were in effect asking for the same exemption that enactment of the bills would have provided.

Mr. Justice BURTON announced that he retained the views expressed in his dissent to the *Toolson* case, but joined in the opinion and judgment of the Court. Mr. Justice REED noted that he concurred in this position.

In a dissenting opinion, Mr. Justice MINTON declared that boxing is not trade or commerce and therefore there could be no monopoly or restraint of trade or commerce in the sport.

Mr. Justice FRANKFURTER also wrote a dissenting opinion in which Mr. Justice MINTON joined. This

Reviews in this issue by Rowland Young.

opinion took the position that there is not a "single differentiating factor between other sporting exhibitions . . . and baseball" insofar as the Sherman Act is concerned.

The case was argued by Philip Elman for appellant and by Whitney North Seymour and Charles H. Watson for appellees.

Appeals . . .

Appealability of district court's refusal to stay an action for an accounting pending arbitration

■ *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 99 L. ed. (Advance p. 171), 75 S. Ct. 249, 23 U.S. Law Week 4065. (No. 31, decided January 10, 1955.) *Judgment of the Court of Appeals for the Second Circuit affirmed.*

May an appeal be taken from a district court's refusal to stay an action for an accounting pending arbitration? The Supreme Court answered *no* in this decision.

The case began as an equitable action for an accounting in a state court and moved to the federal district court on the ground of diversity of citizenship. The accounting sought was for the profits of a joint venture in construction under the National Housing Act; the joint venture agreement contained a clause stating that any "dispute in the calculation of the net profits" should be settled by an accountant. Petitioner moved for a stay of the action pursuant to Section 3 of the United States Arbitration Act, 9 U.S.C. § 3. The District Court denied the stay, petitioner appealed and the Court of Appeals dismissed the appeal.

The Supreme Court's decision was written by Mr. Justice REED. The result turned on an interpretation of 28 U.S.C. § 1292 (1), which makes an exception to the general policy against piecemeal appeals by permitting appeals from "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

The Court said that the rationale of appealability under Section 1292 went back to the old division between law and equity, and that stays analogous to injunctions against suits in another court were appealable, while other orders to stay that amounted merely to "steps within the framework of the litigation" were not. The Court admitted that the "analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action" and "springs from the persistence of outmoded procedural differentiations". It reached its decision against appealability because of its feeling that it was better judicial practice to follow the precedents, leaving it to Congress to make such amendments as it might find proper by legislation.

It was announced that Mr. Justice BURTON concurred in the judgment.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, wrote a dissenting opinion, arguing that the District Court's order denying a stay was "final" and amounted to a "refusal to grant an interlocutory injunction within the meaning of § 1292".

The case was argued by Morris Rosenberg for petitioner and by Charles Wilson for respondent.

Indians . . .

Compensation for taking of timber from tribal lands

■ *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 99 L. ed. (Advance p. 249), 75 S. Ct. 313, 23 U.S. Law Week 4089. (No. 43, decided February 7, 1955. *Judgment of the United States Court of Claims affirmed.*

In this case, a tribe of Alaska Indians was denied compensation for a taking by the Government of timber from lands allegedly belonging to the tribe. The Indians asserted their claim under the Fifth Amendment. In denying recovery, the Court of Claims characterized the tribe's interest in the lands as the "original Indian title" or "Indian right of occupancy".

Mr. Justice REED, speaking for the Court, declared that there was nothing in the statutes relied upon by petitioner to indicate any congressional intention to grant Indians any permanent rights in the lands of Alaska that they occupied. "Rather" the Court said, "it clearly appears that what was intended was merely to retain the status quo until further congressional or judicial action was taken." The aboriginal interest of the Indians in land, the Court said, was a mere right of occupancy, not ownership, and, in the absence of congressional recognition, the interest could be extinguished by the Government without compensation.

Mr. Justice DOUGLAS wrote a dissenting opinion in which the CHIEF JUSTICE and Mr. Justice FRANKFURTER joined. The dissent argued that the Organic Act for Alaska of 1884 was a congressional recognition of the claims of the Alaska Indians to their lands, the exact nature of which was left open for further settlement. The dissenters would have remanded the cause for a determination of whether the rights recognized in 1884 included timber rights.

The case was argued by James Craig Peacock for petitioner and by Ralph A. Barney for respondent.

Liens . . .

Priority of federal tax lien over local lien

United States v. *Acri,* 348 U.S. 211, 99 L. ed. (Advance p. 193), 75 S. Ct. 239, 23 U.S. Law Week 4055. (No. 33, decided January 10, 1955). *Judgment of the Court of Appeals for the Sixth Circuit reversed.*

Three cases decided on January 10 involved the relative priority between state-created liens and liens of the United States for unpaid taxes.

In the first, respondent Acri was in prison for the murder of one Oravec. Oravec's personal representative filed an action against Acri for wrongful death on August 6, 1947. At the same time, the personal representative attached cash and bonds belonging to Acri. Judgment against Acri was awarded on January 19, 1949. Meanwhile, on November 19, 1947, the Collector of Internal Revenue received the assessment lists for the unpaid taxes of Acri and his wife for the years 1942-1946.

The Collector mailed demand for payment of the taxes on November 19, and on November 21 a notice of the tax liens against Acri's property was filed in the office of the county recorder.

Mr. Justice MINTON, speaking for the Supreme Court in a unanimous opinion upholding the priority of the federal lien, declared that the case was controlled by *United States* v. *Security Trust Company*, 340 U.S. 47 (1953), which raised the identical issue. The relative priority of a lien of the United States for unpaid taxes is a federal question, as held in the *Security Trust* case, the Court said. It was held to be immaterial that, under state law, the judgment lien on Acri's property was considered to be perfected as of the time of attachment.

The case was argued by Charles K. Rice for petitioner and by Francis B. Kavanagh for respondent.

■ *United States* v. *Liverpool and London Globe Insurance Company, Ltd.*, 348 U. S. 215, 99 L. ed. (Advance p. 195), 75 S. Ct. 247, 23 U. S. Law Week 4056. (No. 34, decided January 10, 1955.) *Judgment of the Court of Appeals for the Fifth Circuit reversed.*

The second of the federal tax lien cases involved a lien of garnishment.

A creditor brought suit on an open account shortly after his debtor's property had been destroyed by fire. The creditor secured a writ of garnishment attaching the insurance funds due and owing to the debtor. This suit was begun April 8, 1952. On April 21, the Collector received the assessment lists for unpaid federal taxes, and notice of the Government's tax lien was filed in the office of the county clerk on April 26. Judgment was entered in the creditor's favor on June 20. A United States District Court held that the lien of the garnisher was superior to those of the United States and allowed the garnishee $500 for attorney's fees. The Court of Appeals affirmed.

Mr. Justice MINTON again spoke for the Court, holding in favor of the United States, citing the *Acri* case, *supra*, and its progenitor, *United States* v. *Security Trust Company*, as controlling.

The case was argued by Charles K. Rice for the petitioner.

■ *United States* v. *Scovil*, 348 U. S. 218, 99 L. ed. (Advance p. 197), 75 S. Ct. 244, 23 U. S. Law Week 4057. (No. 35, decided January 10, 1955.) *Judgment of the Supreme Court of the State of South Carolina reversed.*

The relative priority of a landlord's distress under state law and a lien for unpaid taxes due to the United States was decided in favor of the latter in the third of these cases.

The landlord "proceeded on the 7th day of April, 1952 to distress upon the assets . . . for said rent in arrears". On the next day, a receiver was appointed for the tenant as an insolvent; all the tenant's assets passed to this receiver who sold them and realized the fund at issue in the case. The Collector received the proper assessment lists in his office on five dates, all prior to March 1, 1952. Notice of the liens was filed in the county in which the landlord lived on April 10, 1952. The state supreme court held that the landlord's lien was superior to that of the United States since the distress warrant was perfected before the receiver had been appointed. The court relied on Section 3466, Rev. Stat., 31 U.S.C. § 191.

Again speaking through Mr. Justice MINTON, the Supreme Court found it unnecessary to consider the effect of Section 3466, basing its holding instead on *United States* v. *Security Trust Company, supra*, saying that the question when a lien is perfected for federal tax purposes is one for the federal law to determine.

The case was argued by John R. Benney for petitioner and by J. D. Todd, Jr., for respondent.

Seamen . . .

Recovery from the estate of a tortfeasor in an action under the Jones Act

■ *Cox* v. *Roth*, 348 U. S. 207, 99 L. ed. (Advance p. 190), 75 S. Ct. 242, 23 U. S. Law Week 4058. (No. 40, decided January 10, 1955.) *Judgment of the Court of Appeals for the Fifth Circuit affirmed.*

In this case the Court allowed recovery from the estate of the tortfeasor in an action brought under the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688.

The Jones Act suit was filed by the administrator of the estate of one Jim Dean, a seaman lost at sea, against the estates of the owners of the vessel. One of the owners of the ship had been drowned in the same disaster in which Dean lost his life, while the other died shortly after the accident.

In affirming the award under the statute, the Supreme Court spoke through Mr. Justice CLARK. The difficulty in the case came from the fact that the Jones Act does not specifically enumerate seamen's rights, but extends to them the same rights granted to railway workers by the Federal Employers Liability Act. That statute, applied literally to the facts of this case, would have resulted in a denial of recovery, since the Liability Act does not specifically permit suits against the personal representatives of an employer; the railroads are owned by corporations and there are various regulations that prevent them from discontinuing business.

The Court, however, refused to apply the Employers Liability Act language literally, declaring that to do so "would frustrate the congressional purpose" in enacting the Jones Act. The latter does not mean, the Court said, that "the very words of the FELA must be lifted bodily from the context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting."

The case was argued by Douglas D. Batchelor for petitioner and by Harvey Goldstein for respondent.

Treaties . . .

Alleged breach of contract made in order to carry out executive agreement between United States and Canada

■ *United States* v. *Guy W. Capps, Inc.*, 348 U. S. 296, 99 L. ed. (Advance p. 262), 75 S. Ct. 326, 23 U. S. Law Week 4085. (No. 14, decided February 7, 1955.) *Judgment of the Court of Appeals for the Fourth Circuit affirmed.*

This case involved an executive agreement between Canada and the United States whereby Canada agreed to limit its export of potatoes into the United States. The decision attracted more than usual interest because it had been expected that the Court's opinion might further clarify the status of executive agreements under the Constitution. The Court decided the case, however, without reaching the question of the validity of the agreement.

The agreement was made in 1948 as the result of a bumper crop of Irish potatoes in both countries. The Agricultural Act of 1948 obligated the United States Government to support the price of potatoes at 90 per cent of parity by purchase of all Irish potatoes that could not be sold commercially at that price. The unsupported Canadian prices were lower, making it profitable to import potatoes from Canada in spite of the tariff and freight. The Canadian Government agreed to prohibit the export of potatoes for table stock and to require exporters to obtain assurance from their American customers that potatoes exported for seed stock purposes would not be diverted for table stock.

Respondent imported 48,544 hundred-pound sacks of seed potatoes from Canada. Before shipment, the respondent wired the exporter "Certified seed potatoes loaded on S.S *Gangway* are for planting in Florida and Georgia".

This suit began when the United States filed a complaint alleging that some of the potatoes had been diverted for table stock and that this constituted breach of a contract between respondent and the exporter for the benefit of the United States. The District Court directed a verdict for respondent on the ground that the Government had failed to prove a breach of contract or damages sufficient to sustain a verdict in its favor. The Court of Appeals affirmed, but on the ground that the international agreement, which the contract sought to carry out, was void as not authorized by Congress.

The Supreme Court's decision, written by Mr. Justice BURTON, upheld the District Court's view of the case and made it unnecessary to consider the validity of the executive agreement. The Court reviewed the evidence and declared that all respondent had done was sell seed potatoes, labeled as such, at seeding time to concerns that normally deal in seed potatoes. There was no evidence of bad faith or negligence on respondent's part, and the evidence indicated that few, if any, of the potatoes were used as table stock.

The case was argued by Solicitor General Sobeloff for petitioner and by W. R. Ashburn for respondent.

Views of Our Readers

(*Continued from page 302*)

power would permit. Also, it is *common practice* for Congressmen to bring pressure on these administrative judges by calling them on the telephone or writing letters with requests or demanding reasons for decisions—all demands they would not dare to address to the judges of the courts." (Italics added.)

I have been an examiner for more than six years with the National Labor Relations Board and the Post Office Department. Prior thereto, I was counsel and associate counsel for two Senate subcommittees during the 80th Congress, and as a result have many friends on the "Hill" in both Houses.

In all my experience, which postdates the Administrative Procedure and Taft-Hartley Acts, I have never been approached or conferred with privately by litigants or their counsel during a case, nor have I ever been contacted by a Congressman concerning a case or decision, much less subjected to pressure or demands for explanations of decisions. In view of my acquaintances in Congress, it would seem more probable that I would be so contacted than others with fewer such acquaintances.

I resent the implication on behalf of both my fellow examiners and my friends on the Hill. No one, including all litigants and agency officials, has ever sought to influence me or requested reasons for my decisions. I cannot speak for all examiners, but I have been president of the NLRB Trial Examiners' Association for two years, whose members agree with my experiences and statements herein, and I have never heard of any such conduct by litigants, counsel or Congressmen. Certainly it cannot be characterized as "common practice". While examiners may lack the power of contempt, we have the power of decision, and in my opinion such conduct would not only be unethical but also foolish.

ROBERT L. PIPER
Chevy Chase, Maryland

Praises the Article by Mr. vom Baur

■ The article in the January number by Mr. vom Baur, "The Administrative Process", is outstanding. As to Point Second of the article, consider recent congressional interference in proceedings now current before the Federal Power Commission. Point Fifth: during O. P. A. abuses and excesses, Judge Alexander Holtzoff pointed out that businessmen and property owners were protected by constitutional guarantees no less than unpropertied persons. Point Sixth: Chief Judge Hutcheson long ago debunked administrative "expertise".

The American Bar Association should find a way to obtain wide circulation for the vom Baur article.

CLAUDE MCCOLLOCH
United States District Court
Portland, Oregon

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

Administrative Law . . . *appeals boards*

■ The Department of the Interior has joined an increasing number of other federal agencies in establishing a Board of Contract Appeals to which contractors engaged on Interior projects may appeal their claims against the Government.

The Board was established by order of the Secretary of the Interior effective December 31, 1954, and published in the *Federal Register* that date. The order provides for a three-man board with the Department's Assistant Solicitor for Claims and Contract Appeals as Chairman. The three members are Theodore H. Haas (Chairman), Thomas C. Batchelor and William Seagle. There are also five alternate members, who serve in special circumstances or in the absence or disability of regular members.

Questions on appeal ordinarily arise from the findings of fact and decisions of contracting officers of the Department. They involve such matters as liquidated damages assessed for delay, changes and changed conditions resulting in increased costs to the contractor and problems arising from the termination of contracts. Decisions of the new Board will be final insofar as the Department is concerned, but a disappointed contractor may thereafter bring suit in the Court of Claims.

A considerable number of federal agencies have similar boards. Among the most active are the Armed Services Board of Contract Appeals and the General Services Administration Board of Review.

(Release of the Department of the Interior.)

Aliens . . . *suspension of deportation*

■ Joseph Accardi's lengthening fight to avoid deportation has had a successful turn. The Court of Appeals for the Second Circuit has ruled that the Board of Immigration Appeals was controlled by an order of the Attorney General when it refused Accardi's application for suspension of his deportation order, and that the Board therefore failed to exercise the discretion assigned to it by statute. Accordingly, the Court decided, Accardi is entitled to release by way of habeas corpus.

A little background is necessary. Accardi is admittedly a deportable alien. Hearings on a deportation charge against him, and on his application for suspension of deportation under 8 U.S.C.A. §155 (c), were held at various times from 1948 to 1952. In 1952 a deportation order was issued and suspension denied. In 1953 the Board of Immigration Appeals affirmed.

Accardi's wife then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The principal ground of the petition was that the Board had not given the plea for suspension of the deportation order fair consideration because the Attorney General had circulated a list, containing Accardi's name, of persons he desired deported and had made statements in press conferences to the effect that he would deport certain "unsavory characters", of which Accardi was one.

The district judge refused to order a hearing on the allegations and dismissed the writ. The Court of Appeals agreed with the district court [206 F. 2d 897], but the Supreme Court [347 U.S. 260] disagreed. It held that Accardi was entitled to an opportunity to prove his contention that the Board did not "exercise its own independent discretion", but was controlled by the Attorney General's list of undesirables. The Court remarked, however, that even if Accadi were successful in proving this, he might still fail to convince the Board or the Attorney General, "in the exercise of their discretion, that he is entitled to suspension. . . ."

Thus the case went back to the district court for a hearing. Testimony was taken and exhibits introduced. The then Attorney General (McGranery) admitted he had a list of persons he wanted deported, that Accardi was on the list and that the Board had the list when it decided the case. No one denied that Accardi's name was linked in speeches and press releases with a group of undesirables as to whom there existed a deportation program. But the Board members who heard the case testified that their decision was untrammelled and not dictated. The District Court again dismissed the writ.

Back again in the Court of Appeals, with Judge Harlan dissenting, the dismissal has been reversed. The Court declared that it was inescapable that the Board was influenced by the Attorney General's list and statements, and that, this being so, the Supreme Court's opinion entitled Accardi to a new hearing before the Board. "It is incredible, human nature being what it normally is," Judge Frank said for the Court, "that the Attorney General's statements . . . did not *unconsciously* [Court's emphasis] influence the Board members so that they felt obliged not to exer-

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

cise their discretion and, without doing so, to decide against Accardi."

(*U. S. ex rel. Accardi* v. *Shaughnessy*, C.A. 2d, January 7, 1955, Frank, J.)

Courts . . .
facilities

■ It is no secret that many of the nation's courthouses are becoming decrepit and that most of them lack elevators. In Marion, Ohio, there is no elevator in the courthouse, and a recent case in the Ohio Supreme Court indicates there won't be one for awhile.

In Marion they chose a direct method to get an elevator. A committee of the Marion County Bar Association filed a petition in the common pleas court of the county requesting the court to inquire into the necessity of an elevator in the courthouse. This the court did. It found the elevator needed and ordered the county commissioners to install one. An intermediate appellate court affirmed the order, and the harried commissioners went to the Supreme Court.

With two judges dissenting, the Court reversed the order. It held that a statute charging the county commissioners with the duty of providing "such facilities as will result in expeditious and economical administration of . . . county offices" did not authorize the elevator order. Neither was there inherent power, the Court continued, for the lower court to order provision of anything more extensive than space, supplies and some repairs.

One of the two dissenters queried: "Just what authority does a court of common pleas have if it is unable to provide itself with such an obviously necessary facility as an elevator for the use of parties, counsel, jurors and witnesses who, under penalty of the law, are required to be present in court irrespective of their age or condition of health?"

(*Committee for Marion County Bar Association* v. *County of Marion*, Sup. Ct. Ohio, December 15, 1954, Taft, J., 123 N.E. 2d 521.)

Criminal Law . . .
habeas corpus

■ The three men convicted in the "*Reader's Digest* Murder Case" [*Stein* v. *New York*, 346 U.S. 156] have failed in a habeas corpus bid in the United States District Court for the Southern District of New York. The Court has ruled that they failed to prove their contention that the state placed an eavesdropper in the courtroom to overhear and report on conversations among them and their counsel.

Making a bid in the federal district court after exhausting state remedies, the defendants alleged that a state police officer in plainclothes was stationed in the courtroom a few feet from the defense counsel table during a portion of their trial. The defendants said this was suspicious because they held most of their courtroom conversations in Yiddish and the officer was the only member of the force who understood Yiddish. On the other hand, eavesdropping was denied by those involved in the trial for the state.

The Court agreed with the state courts that the petitioners had failed to prove any eavesdropping or even an intent to do so. The Court noted that the officer was at the supposed listening post only a few days at the tail-end of the trial, and that he was not there during the state's case when eavesdropping might have been of some value.

Initially, the Court, interpreting the rule of *Brown* v. *Allen*, 344 U.S. 443, held that where a state prisoner, after having exhausted state remedies, petitions a federal court for a writ of habeas corpus, the court has discretion to determine whether it will decide the case on the record of proceedings in the state court or hold a hearing. Here, the Court determined, the state record was sufficient and a hearing was denied.

(*Cooper et al.* v. *Denno*, U.S. D.C. S.D. N.Y., January 17, 1955, Kaufman, J.)

Fair Trade Laws . . .
McGuire Act

■ Generally speaking, the McGuire Act [15 U.S.C.A. §45], which validates provisions of state fair trade laws binding nonsigners to any fair trade agreement, has fared well in the courts. Non-signer provisions depending on McGuire have been upheld against constitutional attack in New York and New Jersey [40 A.B.A.J. 991; November, 1954] and the Supreme Court dismissed appeals in both cases for want of a substantial federal question [75 S. Ct. 87, 88]. They were also approved by the Court of Appeals for the Fifth Circuit [205 F. 2d 788] and the Supreme Court denied certiorari [74 S. Ct. 71].

On the other hand, the McGuire Act failed to save the non-signer provisions of Florida's fair trade act [40 A.B.A.J. 992; November, 1954]. Oregon avoided a ruling on the constitutionality of its fair trade act by deciding a case on other grounds [41 A.B.A.J. 262; March, 1955].

Now the Supreme Court of Georgia, saying that it will not "follow the crowd", has declared the non-signer provisions of that state's 1953 re-enacted fair trade law violative of the state's due-process constitutional requirements. "What the courts of other states have decided is not controlling", the Court averred, "and this is one of the few powers left to states to decide for themselves regardless of what the Supreme Court of the United States may or may not have decided." The Court observed that it was familiar with the "modern trend to allow the government to more and more encroach upon individual liberties and freedoms", but said that it would not strike down the state's constitution to accomplish that purpose.

The nub of the statute's violation, in the Court's opinion, was that it fettered the freedom of seller and buyer to contract for a sale price. It viewed the fair trade law as essentially a price-fixing scheme, and declared that the legislature could authorize price-fixing only in a business affected with a public interest.

The Court rejected an argument that the fair trade law was not a price-fixing statute, but only an enactment for the purpose of protect-

ing the property right of the manufacturer in his trade name and trade mark. It also turned down a contention that the legislature's "findings of fact", included in the statute, were binding on the Court. They were "simply arguments presented to the General Assembly as to the reasons why they considered the act necessary", it said.

One judge dissented.

(*Cox et al.* v. *General Electric Company*, Sup. Ct. Ga., January 10, 1955, Wyatt, J.)

Insurance Law . . .
excess

■ One of the fascinating things to personal-injury practitioners about insurance law and its relation to automobile negligence cases is the possibility that an insurer may be held for more than policy limits if it has failed to settle a claim in "good faith" within those limits. But the cases are in a stew about whether the insured must actually pay the excess of the judgment over insurance before a case may be made against the insurer for the excess.

In a forthright examination of the confusion, the United States District Court for the Western District of Missouri has held that an insured may maintain an action in tort against the insurer even though he has not, and has not alleged, that he has paid that part of the final judgment remaining after application of the insurance proceeds.

The factual pattern of the case was familiar: plaintiff sued insured for serious personal injuries; insurer assumed defense of the case and investigated; plaintiff offered to settle for $15,000, the policy limit; insured said "settle" and wrote insurer he would hold it for excess; insurer refused to settle; the jury gave plaintiff verdict and the trial court entered judgment for $60,000, which was reduced by the state supreme court to $47,500; the insured wants insurer to dig up the missing $32,500.

The Court observed that while the insured's action stemmed from a contract, it was really an action in tort based upon the insurer's breach of duty to perform in good faith the terms of the policy. If a tort action is proved, the court continued, the plaintiff is always entitled to at least nominal damages, and for that reason alone the insured's action could stand without an allegation of payment of the excess.

But the Court preferred to go beyond the nominal-damages theory and ruled that the mere existence of the excess liability of the judgment established damage and its measure. To the Court, this ruling squared by analogy with general Missouri law that a personal-injury plaintiff has an action if he has incurred medical or hospital expense, even though he has not paid it.

The Court found that only five jurisdictions have squarely decided the point involved in this case. Two (New Hampshire and the Court of Appeals for the Fourth Circuit) have held payment of the excess a prerequisite to suit against the insurer, two (Wisconsin and Tennessee) have ruled otherwise and one (Texas) has gone both ways.

In a companion to the instant case, the original personal-injury plaintiff sought by declaratory judgment a declaration that the insurer was liable to her for the excess, but the Court dismissed this complaint because the insured—an "indispensable party"—was not joined.

(*Wessing et al.* v. *American Indemnity Company; Douglas* v. *Same*, U.S. D.C. W.D. Mo., January 13, 1955, Whittaker, J.)

Libel and Slander . . .
privilege

■ Applying the universal rule that defamatory statements made in a judicial proceeding by a party or his attorney are absolutely privileged, if relevant, the Supreme Court of Minnesota has affirmed the dismissal of a slander action against an attorney who, during a hearing in which he was both a party (as a guardian) and attorney for himself, termed a woman an "adulteress".

The victim of the remark claimed that she was the ward's wife, while the attorney-guardian maintained that the ward had another wife from whom he was not divorced. At a hearing on an account, the bone of contention became whether the woman was entitled to support money from the ward's estate as his lawful wife.

The Court declared the remark was absolutely privileged since it was relevant to the proceeding. Relevancy, it continued, need not be legal relevancy; the true test is whether the defamatory matter has some relation to the subject matter of the judicial proceeding. In the present case, the Court said, the remark of the attorney had some relation since the supposed wife's claim would necessarily be based on a husband-and-wife relationship. The Court observed, moreover, that any doubt on the relevancy issue should be resolved in favor of the person claiming the privilege and that refined distinctions would not be permitted to defeat the privilege.

(*Matthis* v. *Kennedy*, Sup. Ct. Minn., November 26, 1954, Nelson, J., 67 N.W. 2d 413.)

Sales . . .
warranty

■ When a hospital furnishes blood to a patient for a tranfusion, it does not make a "sale" of the blood as personal property. Therefore, the Court of Appeals of New York has held, no action lies against the hospital on a breach of warranty theory that the blood is not reasonably fit for the purpose for which it was intended.

The Court's decision was on a motion to dismiss the complaint, which had alleged a "sale" for $60 of the blood by the hospital to the plaintiff. The complaint further stated that the hospital impliedly warranted the blood to be pure, but that it contained impurities which caused the plaintiff to become "afflicted with homologous serum jaundice" or "homologous serum hepatitis".

With three judges differing, the Court ruled that the patient's contract was for services and that the concept of purchase and sale of per-

sonal property could not be attached separately to the "healing materials" furnished by the hospital and charged to the patient. Where service predominates in a transaction, the Court remarked, the transfer of personal property is incidental and not within the sales act, and no action for a breach of an implied statutory warranty lies. The Court observed that its decision left untouched the question of the hospital's liability for negligence.

The dissenters disagreed with granting the hospital immunity on a motion to dismiss the complaint. They felt the complaint should stand and the plaintiff permitted to prove the "sale", if she could.

(*Perlmutter* v. *Beth David Hospital*, C.A. N.Y., December 31, 1954, Fuld, J., 123 N.E. 2d 792.)

Taxation . . . *business tax*

■ Radio music conductor Donald Voorhees plays sweeter music to New York's Court of Appeals than he does to the state's Tax Commission. Reversing the Commission's finding, the Court has held that Voorhees was not subject to New York's unincorporated business tax.

The controversy concerned the year 1941 and the employment Voorhees then had as musical director and conductor on "The Telephone Hour" and "Cavalcade of America". In order to fall into the exception to the tax statute, Voorhees had to show that he practiced a "profession", that he derived more than 80 per cent of his gross income from services rendered by him personally and that capital was not a material income-producing factor.

The fact that capital was not involved in the case was conceded, and the Court had little trouble in deciding Voorhees' activities qualified as a "profession". But the Court split four-to-three on the question whether he derived 80 per cent of his gross income from personal services.

Voorhees was paid a set fee for each broadcast, but also received the musicians' and arrangers' payroll which he in turn paid. The majority ruled that the latter was merely a wash transaction in which Voorhees was only a conduit and that those sums should not be considered part of his gross income. The dissenters thought the musicians' payroll could be considered a part of Voorhees' income, as the Tax Commission had decided, and that the Commission's finding that he did qualify under the 80-per-cent rule should stand.

(*Voorhees* v. *Bates et al.*, N.Y. C.A., December 31, 1954, Froessel, J.)

Taxation . . . *"windfall profits"*

■ The Government has failed in its first attempt to impose a tax as ordinary income on the so-called "windfall profits" arising to builders who received proceeds from government-insured mortgages in excess of construction costs. The Tax Court of the United States has held that "windfall profits" should be taxed as capital gains under I.R.C. §115 (d) of the 1939 code.

The case involved numerous corporations, all controlled by one family, which built and operated the Glen Oaks housing development in New York City. The distributions made to stockholders came from various sources: excess of FHA-insured mortgage receipts over construction costs, premiums on mortgage bonds issued, gross rents and depreciation reserves. The distributions exceeded earnings and profits and in all cases the stock had been held more than six months.

The Court ruled that the distributions in excess of earnings and profits should be applied against and reduce the adjusted basis of the stock, and that the excess over the adjusted basis should be taxed as long-term capital gain. The Court remarked that it was "not unaware that the propriety of [similar distributions] has elsewhere been questioned" but said that its decision must be based on tax statutes.

One judge, concurring, pointed out that a different result would be reached under §312 (j) of the 1954 code, but that it did not become effective until June 22, 1954.

(*Gross et al.* v. *Commissioner*, U.S. Tax Ct., January 31, 1955, Tietjens, J.)

Torts . . . *liability for "traps"*

■ The Court of Appeals of New York has held the owner and user of real estate liable for the death of a 12-year-old boy who fell down a flimsily-covered shaft maintained on the premises.

The shaft was fifty-five feet deep with a four-by-four opening, usually covered by metal trap doors. At the time of the boy's fall, however, only one door was in use and the other side of the opening was covered with a board arrangement described as "jerry-built" and "flimsy". There was evidence that the building was in a congested neighborhood and that children often played in the vicinity.

New York does not consciously adhere to the "attractive nuisance" doctrine, but the Court didn't need it to find liability. Neither did it consider the fact important that the boy was a trespasser, or at best a bare licensee. The Court thought the case more like the classic spring-gun situation. It declared that the defendants had created a "deceptive trap for the unwary" and had done so affirmatively in contradistinction to allowing a defective condition to arise. Besides being insecure, the Court said, the wooden platform "gave a deceptive appearance of safety, was pregnant with hazard and the direct consequences were clearly foreseeable".

Two judges dissented on the theory that no violation of a duty owed to a trespasser had been shown.

(*Mayer* v. *Temple Properties, Inc.* N.Y. C.A., November 18, 1954, Froessel, J., 122 N.E. 2d 909.)

Treaties . . .
executive agreements

■ A recent decision of the United States Court of Claims is of timely importance in view of the re-introduction in the 84th Congress of the Bricker Amendment in the Senate and four variations of it in the House (H.J. Res. 33, 41, 59 and 60).

Without deciding specifically whether an executive agreement is a treaty within the Constitution (the apparent meaning of *U.S.* v. *Pink*, 315 U.S. 203), or whether even a formally ratified treaty can abrogate rights guaranteed by the Constitution, the Court ruled: "Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair constitutional rights."

The Court had decided that a naturalized American citizen who owned property in Austria was entitled to compensation under the Fifth Amendment for the taking of her property by the United States Army for an officers' club after World War II hostilities. The Court was then met with the Government's contention that the plaintiff's claim was absorbed by a 1947 executive agreement between the United States High Commissioner in Austria and the Austrian government under which the United States paid a specified sum for damage to persons owning property in Austria. But this executive agreement the Court held, could not deprive the plaintiff of her constitutional right to just compensation under the Fifth Amendment.

(*Seery* v. *U.S.*, U.S. Ct. Cls., January 11, 1955, Madden, J.)

Trials . . .
exclusions

■ Persuaded that "the demands of public morality do not justify judicial nullification of the right of public trial" except in cases specified by statute, the New York Court of Appeals has affirmed reversal of the conviction of Minot F. Jelke, on the ground that the trial judge excluded the general public from the courtroom during presentation of the prosecution case. [For action below, see 40 A.B.A.J. 409; August, 1954.]

The defendant was tried for compulsory prostitution. When it was revealed in opening statements that some testimony concerning sodomy would be shown, the trial judge, on his own motion, excluded the public and press from the trial during the state's case, permitting, however, the attendance of "any friends or relatives [the defendant] deems necessary for the protection of his interests."

By statute, New York provides that a criminal defendant is entitled to "a speedy and public trial". Another statute provides that "the sittings of every court within this state shall be public, except that in all proceedings or trials in cases for . . . sodomy . . . " the trial judge may exclude the general public. But the trial judge did not base his exclusion order primarily on the statute, but on "the sound administration of justice and . . . the interests of good morals".

In finding that the exclusion order denied the defendant a public trial, the Court ruled that the order was not within the scope of the statute simply because testimony concerning sodomy would be introduced. This, the Court remarked, did not alter the fact that the prosecution was for compulsory prostitution, a crime not specified in the statute. Nor, the Court continued, does the statute reflect a policy of permissible exclusion of the general public and press in cases not specified, where evidence of an indecent or filthy nature is anticipated.

Although the Court conceded that above and beyond the statute a trial judge has inherent power to exclude, it declared that in the instant case the defendant was deprived of a substantial right, and that the requirement of a public trial was not met by allowing relatives and friends of the defendant's choosing to be present.

Two judges, dissenting, thought that the holding would be a surprise to the Bench and Bar of New York. They declared that it had never been doubted that a "trial judge in New York may exclude the general public from 'sex trials' ".

(*People* v. *Jelke*, N.Y.C.A., December 31, 1954, Fuld, J., 123 N.E. 2d 769.)

■ Although the Court in the *Jelke* case emphasized that the right to a public trial "demanded . . . that he be not deprived of the possible benefits of attendance by the press", it held in a related case that a press association and several newspapers did not have standing to challenge the trial judge's exclusion order by a writ in the nature of prohibition. [For action below in this case, see 39 A.B.A.J. 413; May, 1953.]

Again with two judges dissenting, the Court declared that the right to a public trial could be invoked and enforced only by one of the parties or litigants and could not be asserted by other persons or by the press. Otherwise, the Court remarked, there would be the anomaly of the defendant willing to forgo a public trial, but the trial judge unable to order exclusion as long as any member of the public wished to attend.

The Court said the fact that the petitioners were in the business of disseminating news gave them no special right or privilege. "The public's interest is adequately safeguarded", it stated, "as long as the accused himself is given the opportunity to assert on his own behalf, in an available judicial forum, his right to a trial that is fair and public."

(*United Press Associations et al.* v. *Valente*, N.Y. C.A, December 31, 1954, Fuld, J., 123 N.E. 2d 777.)

■ While New York wrestled with the problem of a public trial, Ohio stood firm against photographic reporting of court proceedings. The Supreme Court of that state has

affirmed contempt convictions of three *Cleveland Press* representatives who caused a picture to be taken and published of the arraignment of a former probate judge.

In a conference in chambers the day before the arraignment the judge told a *Press* reporter that no pictures would be permitted in the courtroom. On order of the city editor, a photographer took the picture anyhow. The reporter, photographer and city editor were adjudged in contempt and fined.

The Court's opinion consists of an adoption of the opinion of the lower appellate court, which noted that the barring of photography during judicial proceedings is spelled out in Canon 35 of the American Bar Association and is observed in all federal courts and most state courts. The opinion rejected a contention that the judge's order transgressed freedom of the press. "The right to trial in a courtroom conducted and maintained in an atmosphere that bespeaks the profound and dignified responsibilities with which those who are conducting its proceedings—dealing with human rights as they must—are charged, is basic", the opinion declared.

(*Ohio* v. *Clifford et al.*, Sup. Ct. Ohio, December 15, 1954, *per curiam*, 123 N.E. 2d 8.)

Nominating Petitions

Arkansas

■ The undersigned hereby nominate Edward L. Wright, of Little Rock, for the office of State Delegate for and from the State of Arkansas to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Bernal Seamster, H. B. Stubblefield, James I. Teague, Herchell B. Bricker, Ashley Cockrill, R. C. Limerick, Jr., P. A. Lasley, Henry M. Armistead, Frank J. Wills, J. Fred Jones, Bronson Cooper Jacoway, Gerland B. Patten, Verne McMillen, Wayne W. Owen, Abner McGehee and W. H. Rector, of Little Rock;

Louis L. Ramsay, Jr., Hendrix Rowell, John Harris Jones, John E. Hooker, Stephen A. Matthews, Frank G. Bridges, Jr., F. G. Bridges, Paul B. Young and Gordon E. Young, of Pine Bluff.

Colorado

■ The undersigned hereby nominate Edward G. Knowles, of Denver, for the office of State Delegate for and from the State of Colorado to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Thomas M. Burgess, Merrill E. Shoup, Alfred Heinicke and C. B. Horn, of Colorado Springs;

Erskine R. Myer, Mason A. Lewis, James A. Woods, Orie L. Phillips, Charles J. Kelly, William E. Hutton, Samuel S. Sherman, Jr., Dayton Denious, William S. Jackson, Pierpont Fuller, Fritz A. Nagel and J. G. Hodges, of Denver;

James K. Groves and Miles Kara, of Grand Junction;

John W. Henderson, Hubert D. Waldo, Jr., Robert G. Smith and Barnard Houtchens, of Greeley;

Hatfield Chilson, of Loveland;

Maurice A. Evensen and Leo S. Altman, of Pueblo.

Delaware

■ The undersigned hereby nominate William Poole, of Wilmington, for the office of State Delegate for and from the State of Delaware to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

William H. Foulk, Edward W. Cooch, Jr., Herbert L. Cobin, Januar D. Bove, William Duffy, Jr., James L. Latchum, John P. Sinclair, David F. Anderson, Richard F. Corroon, Howard L. Williams, W. Reese Hitchens, Albert W. James, William F. Lynch II, John J. Morris, Jr., H. James Conaway, Jr., Henry M. Canby, C. S. Layton, Charles F. Richards, Louis J. Finger, William A. Worth, Jr., James T. McKinstry, Aaron Finger, E. N. Carpenter II, Rodney M. Layton and George T. Coulson, of Wilmington.

Kansas

■ The undersigned hereby nominate W. D. P. Carey, of Hutchinson, to fill the vacancy in the office of State Delegate for and from the State of Kansas:

D. C. Martindell, Claude E. Chalfant, Edwin B. Brabets, Robert C. Martindell, R. J. Gilliland, Jack C. Stewart, J. F. Hayes, C. W. Miller, H. R. Branine, Harry H. Dunn, Walter F. Jones, J. Richards Hunter, Clyde Raleigh and Fred C. Littooy, of Hutchinson;

George B. Powers, John F. Eberhardt, Carl T. Smith, Robert C. Foulston, Stuart R. Carter, Lawrence E. Curfman, Thomas A. Wood, Lawrence Weigand, Orval J. Kaufman, Byron Brainerd and Claude I. Depew, of Wichita.

Ohio

■ The undersigned hereby nominate Eugene J. Chesney, of Cleveland, for the office of State Delegate for and from the State of Ohio to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Roland H. Strasshofer, Jr., Einar G. Carlson, Rexford C. Hyre, Robert M. Weh, William M. Byrnes, M. E. Newcomer, Maurice F. Hanning, C. F. Taplin, Jr., Rufus S. Day, Jr., William A. McAfee, J. J. P. Corrigan, Rees H. Davis, A. H. Fiebach, Samuel H. Silbert, George E. Beach, Myron W. Ulrich, David C.

Meck, Mary B. Grossman, Lillian M. Westropp, Donald F. Sands, Francis M. Payne, Jr., Clifford E. Bruce, Arthur E. Petersilge, Walter C. Kelley and Dorothy B. Persky, of Cleveland.

Ohio

■ The undersigned hereby nominate Eugene Howard, of Toledo, for the office of State Delegate for and from the State of Ohio to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

Ernest Schatz, George Bradley, Roger H. Smith, Clarence Applegate, Theodore R. Vogt, Jamille G. Jamra, Eliot L. Kaplan, Robert Dunn, Francis J. Gallagher, G. Charles Scharfy, J. H. Nathanson, John R. Eastman, E. R. Effler, Jr., LeRoy Eastman, George Smith, Frank A. Harrington, James Hodge, Jr., Thomas L. Dalrymple, Dwight H. Morehead, Donald Hawkins, Wilson W. Snyder, Louis Lebo, James Nestroff, Michael V. DiSalle and Joseph S. Heyman, of Toledo.

Rhode Island

■ The undersigned hereby nominate Henry C. Hart, of Providence, for the office of State Delegate for and from the State of Rhode Island to be elected in 1955 for a three-year term beginning at the adjournment of the 1955 Annual Meeting:

David B. Lovell, Jr., Fred B. Perkins, James C. Bulman, Melvin A. Chernick, Bayard Ewing, Robert J. Conley, Daniel H. Morrissey, Ralph P. Semonoff, Archie Smith, Francis J. O'Brien, Stephen B. Ives, Jr., Harold A. Andrews, M. Louis Abedon, Aram A. Arabian, Thomas L. Marcaccio, Eugene J. Sullivan, Jr., Thomas J. Hogan, Frank L. Hinckley, Robert W. Shadd, Robert F. Pickard, Stuart H. Tucker, Edward Winslow Lincoln and Edward M. Watson, of Providence;

Richard B. Sheffield, of Newport; William M. Mackenzie, of Pawtucket.

Virginia

■ The undersigned hereby nominate Stuart T. Saunders, of Roanoke, to fill the vacancy in the office of State Delegate for and from the State of Virginia:

Leigh D. Williams, Hugh S. Meredith, Sidney H. Kelsey, H. Lee Kanter, Harry H. Kanter, Joseph L. Kelly, Jr., James G. Martin, James G. Martin, IV, Thomas H. Willcox, Jr., and Thomas H. Willcox;

Frank W. Rogers, Sidney F. Parham, Jr., Whitwell W. Coxe, Andrew S. Coxe, Fred B. Gentry, Leonard G. Muse, John L. Walker, James E. Carr, Martin P. Burks, Richard F. Pence, James P. Hart, Jr., E. Griffith Dodson, Jr., A. Linwood Holton, Jr., George S. Shackelford, Jr., and English Showalter, of Roanoke.

Chief Justice Fred M. Vinson

(Continued from page 326)

however, the seizure had occurred while the war with Germany was in progress, no one, I think, would have questioned the President's power to make the seizure as Commander in Chief in order to keep the war machine in operation. Vinson's activities in connection with the war doubtless caused him to think of the problem presented in the light of that experience and the exercise of powers which would then have been proper. I may say in this connection, that there is nothing in the dissent which warrants the statement which has been made that the seizure was justified by the Chief Justice on the basis of treaties into which this country had entered. His opinion says no such thing and he expressly denied that it was intended to convey any such meaning.

There is no need to speculate about Vinson's ultimate philosophy of law and government. He has given it to us in his own words and with great eloquence. In his address to the American Bar Association in Cleveland in 1947, he said:

> We need . . . to reaffirm our faith in the fundamental values upon which has been based all that is worth while in our society. We need to revitalize our conviction that that society is best which gives the greatest practical recognition to the dignity of individual man and which affords greatest opportunities for the development of the higher potentialities of all men. We need to develop the same high sense of personal responsibility which led the early American Statesman, George Mason, to write: "The debts we owe our ancestors we should repay by handing down entire those sacred rights to which we ourselves were born." We need, finally, to devote our full intelligence and greatest efforts to the task of devising ways and means whereby those essential values can be given their most complete expression in a world of flux and change.

This is the confession of faith of a great American, one who was conscious of the outstanding challenge of our times, the challenge to the supremacy of law, and who wrought mightily to make the reign of law more secure throughout the land.

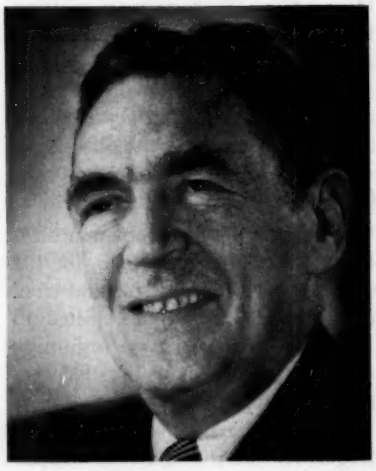
21. 33 A.B.A.J. 1084, 1085.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, John W. Ervin. Chairman; John S. Nolan, Vice Chairman.**

Gift Tax Exclusions: New Developments

by Dwight Rogers, of New York City



Dwight Rogers

I

Gifts to Minors—Three New Rules

■ Parents and others who wish to make gifts to minors will be cheered to know that they can now give up to $3,000 annually to a minor without federal gift tax. This was a conclusion that could not be safely reached under the pre-1954 Code rules because of the confused decisions relating to "future interests".

Congress in the 1954 Code and the Internal Revenue Service in Revenue Ruling 54-400 have greatly clarified the problems involved.

Three new rules relate to (1) outright gifts, (2) gifts in trust where the donee-minor is certain to acquire the principal before or at 21 years of age (so-called 2503 (c) trusts), and (3) gifts in trust where the trustee or another has a power to advance principal to the income beneficiary (so-called 2503 (b) trusts).

First: Revenue Ruling 54-400 (I. R.B. 1954-38, page 13) was a reply to questions whether outright gifts of stock to a minor were "present" or "future interests", "1) before the appointment of a legal guardian, 2) after the appointment of a legal guardian or 3) if no legal guardian is appointed." The gift, answered the Commissioner, (citing *John E. Daniels,* a Tax Court Memorandum opinion of February 13, 1951) "with or without the appointment of a guardian is the gift of a present interest". He minimized the importance of state statutes placing disabilities on minors but stressed the requirement that the gift be "unqualified and unrestricted".

By its terms the ruling interprets only the 1939 Code and applies only to shares of stock, but there is no apparent reason why it should not apply equally to most other forms of property, and to the new Code as well.

Second: the 1954 Code has an entirely new Section, 2503 (c), favoring gifts to minors. A gift to a minor is a present interest and the exclusion will be allowed if the income and the principal itself may be spent by or for the donee before he reaches 21, and if whatever is left must "pass" to the donee at 21, or if he dies sooner to his estate or as he may appoint under a general power.

While an outright gift might fit these specifications, the references to "passing" at 21 and to a "general power of appointment" indicate that Congress intended also to authorize trusts where minors' property could be kept in conveniently transferable and manageable form and where trustees might be given powers to spend principal or to accumulate income—powers which in the absence of this section would be fatal to any exclusion. In drafting dispositive provisions for these 2503 (c) trusts, a careful draftsman, wherever possible, will wait until the regulations are out.

Every gift to a 2503 (c) trust, shares with the outright gift the important infirmity that immediately on reaching 21 the full responsibility of management and control of the property automatically falls on the youthful donee. In the minds of many donors the usefulness of either type gift is therefore somewhat limited, although otherwise both the outright gift and the 2503 (c) trust come close to the ultimate in gift tax convenience and simplicity.

Fortunately for the thoughtful donor who wants to use his annual exclusions but who is bothered by the thought of handing over substantial property to his donees on their twenty-first birthday, the 1954 Code relaxed the "future interest" rule in another respect.

For the purposes of gift tax arithmetic, a gift to the simplest trust to pay income to *B* for life breaks down into two parts, a gift of a present interest in the life estate and a gift of a future interest in the remainder. The respective values of these interests can easily be computed with the aid of the well-known tables furnished in the Regulations. Cases like *Evans* v. *Comm.,* 198 F. 2d 435 (3d Cir. 1952) reluctantly held, however, that if in such a trust the trustee had a power to advance principal to *B,* no exclusion whatever would be allowed. This result was felt necessary because of the impossibility of measuring the value of *B*'s life estate when that value could be decreased or even destroyed by the exercise of the trustee's discretion. No one liked the rule and Congress has now ended it by the last sentence of Section 2503 (b).

As now amended, if *B,* the owner of the estate for life or years, is the only one who can possibly benefit by the exercise of a power over trust principal, the donor will still be en-

titled to his exclusion. This relief is granted without discrimination to minors and to adults alike.

For example, in a trust of $4,000 to pay the income to *B* for life, the life estate is valued in round numbers at $700 if *B* is 80 years old and at $3,400 if *B* is 8 years old. Either sum would be considered a present interest and up to $3,000 would be subject to an exclusion. Under the *Evans* rule, however, the exclusion would have been denied if the trustee had power to advance principal to *B*. Furthermore, if the 8-year-old beneficiary had power to take some or all of the principal into his own hands at age 25 or when he graduated from law school, the value of the present interest would be limited to the computed value of income from the portion of the trust, or for the period, not subject to the power. Since January 1, 1955, the effective date of these new gift tax provisions, the presence in the trust of either or both of these useful powers can be disregarded when the donor computes the exclusion he can apply in reporting his gift. The same exclusion can be claimed as if the powers were not there. This is the 2503 (b) type of trust.

Comparing these two congressional relief measures, enthusiastic use of the 2503 (c) trust is easy to predict. It is as inviting to the experienced as to the novice, while the 2503 (b) trust is camouflaged under a general definition where only the experienced are likely to find it easily. However, the requisite gift tax return will discourage some of those who do, because Section 6019 (a) requires filing a gift tax return whenever a future interest, no matter how small, is the subject of a gift. From the point of view of tax saving, the 2503 (b) trust has most of the advantages of its more conspicuous rival, although every gift made to it will be partially a gift of future interest. Especially as a vehicle for handling the large sums that can result from gifts which use full exclusions year after year, the 2503 (b) trust deserves first consideration of thoughtful draftsmen. For donors whose concern for the final dollar of tax saving does not obscure their wish for sensible family settlements, the 2503 (b) trust can prove valuable.

II

Gifts of Life Insurance

The foregoing makes it clear that during a few weeks in 1954 most of the questions concerning gifts to minors and the gift tax exclusion were resolved. Unfortunately, there remains one important, but not generally known, problem of gift tax interpretation, not limited to minors. In recent unpublished rulings, the Internal Revenue Service has taken the position that no exclusion can be applied to the gift of a life insurance policy if at the time of the gift the policy has no cash or loan value. Gifts by way of premium payments on such policies are similarly regarded. Both were held gifts of future interests in *Nashville Trust Co.*, Tax Court Memo. 1943, No. 43485. The case would be better authority for this proposition if the transfers there had not been made into a type of joint ownership that created future interests quite aside from the absence of cash values. This case seems to go a long way beyond the regulations in seeking out areas to be dubbed "future interests"; Regulation 108, Section 86.11 provides that "the term [future interest] has no reference to such contractual rights as exist in . . . a policy of life insurance, the obligations of which are to be discharged by payment in the future. . . . "

Relatively few policies of ordinary life insurance have cash or loan values the first year, although many have by the second. Consequently many gifts of policies on which less than two or sometimes three premiums have been paid are future interests under these rulings. No matter how small the policy, Section 6019 (a) of the 1954 Code requires both the donor and donee to file gift tax returns. Theoretically, the payment of a 50-cents weekly premium on an industrial policy not owned by the one who makes the payments requires a gift tax return if the policy is without cash or loan value!

Insurance men report that dropping the premium payment test for estate taxability of life insurance has greatly stimulated gifts of life insurance policies and premiums. It's a safe guess that only an insignificant number of those donors whose gifts would be classified as "future interests" by this rule actually filed gift tax returns last March 15.

The Internal Revenue Service is aware of the desirability of restudy, clarification and publicity on this nuisance problem and clearly, cost of administration and enforcement is likely to outweigh any possible gain in revenue. The requirement should be modified or eliminated by corrective legislation.

A Correction

In the note on "Premium Payment" tests in the February issue, there was an unfortunate transposition of lines. The first twelve lines in column 2 on page 175 should have followed the first twelve lines in column 3.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ The Pennsylvania Bar Association held its mid-winter meeting at Pittsburgh in January. Among the speakers were Arthur Larson, Under Secretary of Labor; Dean Acheson, former Secretary of State, and Miss Genevieve Blatt, new Secretary of Internal Affairs.

The annual meeting of the Association will take place during the summer on a date to be announced, at Bedford Springs, when Vice President Paul A. Mueller of Lancaster will be elected president, succeeding J. Campbell Brandon, of Butler.

■ In February The Akron Bar Association and the Akron Civic Forum Committee jointly sponsored a symposium on "The Implications of the Fifth Amendment". The speakers were Francis Biddle, former Attorney General of United States, and Telford Taylor, Associate Trial Counsel at the Nuremberg trials. The program took place at the Akron Jewish Center Auditorium.

■ A survey of the trial courts of Phoenix, Arizona, is being carried out by staff members of the Institute of Judicial Administration of the New York University Law Center, of which Professor Shelden D. Elliott is the Director. The study, begun in February, is being made at the request of the Maricopa County Board of Supervisors in Phoenix, and the team, consisting of Professor Delmar Karlen of the New York University School of Law, associate director of the Institute; Mrs. Fannie J. Klein, research supervisor; and Miss Lucy C. Bush, assistant secretary, will determine causes of congestion and delay in the county trial courts, ascertain whether additional judges are needed and make recommendations for improvement in court administration.

Burnham ENERSEN

■ Burnham Enersen, 49, has been elected President of The Bar Association of San Francisco. He succeeds Eugene H. O'Donnell, whose one-year term expired.

President Enersen was admitted to practice in California in 1930, following graduation from Harvard Law School. He has been prominently identified with local, state and national bar association affairs. He was a member of the California State Bar Committee on Administration of Justice from 1947 to 1954, serving as chairman during the past year.

In addition to electing Enersen President, the association members filled five vacancies on the Board of Directors and named the following to other executive offices: A. Brooks Berlin, First Vice President; Theodore R. Meyer, Second Vice President; Gardiner Johnson, Secretary; Harold R. McKinnon, Treasurer.

The Bar Association of San Francisco was among local associations receiving the American Bar Association's Honorable Mention in the Award of Merit Competition in 1954.

■ Arguing that the principle of the "short ballot" should be applied to the election of judges, Allen T. Klots, President of The Association of the Bar of the City of New York, in an address delivered before the annual meeting of the New York State Bar Association, stated that voters should not be asked to vote on judicial candidates about whom they know nothing and about whose qualifications they are not going to take the trouble to inquire.

Mr. Klots pointed out that on the ballot in a typical district of Manhattan in the last election there were twenty-six vacancies in political offices, from the Governorship down, to be filled. There were some fifty-five candidates from whom the voter had to make his choice. Twenty of the twenty-six vacancies which had to be filled were vacancies in judicial office. "The fact is", said Mr. Klots, "that most of us knew nothing about any of the candidates on the entire ballot except those for Governor and perhaps three or four others."

Mr. Klots, in the course of his speech, released the results of a poll of voters conducted promptly after the last election by the Elmo Roper Organization. Three samplings of the voting population were made: in New York City, in the City of Buffalo, and in Cayuga County. The facts found fully confirmed that most of the voters cannot recall the name of any of the men for whom they voted in judicial contests. The following facts were developed by the poll:

1. In New York City only 19 per cent of those who voted could remember the name of any judicial candidate for whom they had voted. None could remember the name of any judicial candidate for whom they had not voted.

2. In Buffalo only 5 per cent of the voters remembered voting for Judge Desmond, a Buffalo resident. Only 30 per cent of the voters could remember the name of any judicial candidate for whom they had voted.

3. In Cayuga County only 4 per cent could remember the name of any judicial candidate for whom they voted.

4. Not only were the voters unable to name candidates for whom they had voted, but most were unable to name any court being contested—80 per cent in New York City; 89 per

cent in Buffalo; 86 per cent in Cayuga County.

Mr. Klots pointed out that the principle of the "short ballot" which was adopted for state executive offices in 1925 offered a solution to the problem of getting better judges. He said, "This principle is based on the almost self-evident premise that only those offices should be elective which are conspicuous enough to attract public attention. If the office is one with regard to the candidate for which the people will not take trouble to inform themselves, they should not be asked to make the choice."

Mr. Klots pointed out that because voters do not take the trouble to inform themselves about judicial candidates, judiciary offices are peculiarly fair game for the political bosses.

Mr. Klots concluded by saying, "I am not here today to urge any particular plan. My purpose is merely to emphasize the fallacy of the assumption underlying the present practice that our judges are really being chosen by the people. It is perhaps too much to expect that political affiliations will play no part in a judge's selection, whatever method be adopted. But let us hope that it is not too much to expect that political considerations shall not be the only criteria and that some system may be found whereby qualifications for the job may also play an important part."

Other speakers at the annual meeting were Attorney General Jacob K. Javits and Judge Charles E. Clark, of the United States Court of Appeals for the Second Circuit. At the annual dinner Chief Justice Arthur T. Vanderbilt, of New Jersey, was presented the Award of Merit and gave the principal address. An address was also given by Chief Judge Albert Conway of the New York Court of Appeals. New officers of the Association are: President, Edmund H. Lewis, former Chief Judge of the Court of Appeals of New York; Secretary, William J. Darch; and Treasurer, Robert C. Poskanzer.

■ The Chicago Law Institute held its annual meeting at the rooms of the institute in January. The following officers were elected: President, Clifford C. Elger; Vice President, Marcus Levy; Second Vice President, Fred Holy; Librarian, Russell Baker; Treasurer, Thomas F. Allman; and Secretary, Joseph R. Cecchini. To the Board of Managers were elected: Raymond Canaday, John P. Coghlan, Allan W. Cook, John W. Daly, Wendell E. Green, Max L. Libby, Benjamin F. J. Odell, C. S. Bentley Pike, and George F. Rutledge.

Law Student Life Insurance Plan

■ Members of the legal profession always have had a keen appreciation of the social and economic values of life insurance. Because of the high cost involved, however, most of them were unable to obtain insurance protection for their families until they have been practicing long enough to develop an established income.

This situation happily has changed for those who are presently studying law in our schools and those who will follow in the future. On March 1, the American Law Student Association inaugurated a plan through which law students can obtain a $5,000 life insurance policy in a top-line life insurance company, without physical examination, for a total annual premium of $25. This term insurance will remain in force for eight years from the date of law school admission, thus covering the individual during his first years of practice as well as during his law school studies.

This unique plan is open to any law student who is a full-time student in a day or evening school, is a member of a student association affiliated with the American Bar Association sponsored American Law Student Association and who has his application for the insurance accepted by the insurer.

Lawyers who have sons and relatives now in law school have expressed a great interest in the plan. Particularly appealing is the fact that any time during the term-insurance period the individual can convert to an ordinary life policy, again without the necessity of a physical examination.

The insurance will be underwritten by The Minnesota Mutual Life Insurance Company of St. Paul, Minnesota, and the program will be administered by a professional insurance administrator, Roger M. Simpson, of Chicago.

Legal educators first heard of the insurance plan during their annual meeting in New York last December. Their response was most favorable and they now are supporting introduction of the plan to the nation's 35,000 law students in American Bar Association approved law schools. The American Bar Association's Section of Insurance Law also has approved the plan.

Lawyers who are interested in obtaining detailed information about the insurance for the benefit of members of their family or friends who may now be in law school can obtain it by writing to James M. Spiro, Director of the American Bar Association Law Student Program, 1155 East 60th Street, Chicago 37, Illinois.

Law List Committee

■ The following publishers of law lists and legal directories have received Certificates of Compliance from the Standing Committee on Law Lists of the American Bar Association for their 1955 editions.

Commercial Law Lists

A. C. A. List
Associated Commercial Attorneys List
165 Broadway
New York 6, New York

The American Lawyers Quarterly
The American Lawyers Company
1712 N.B.C. Building
Cleveland 14, Ohio

The B. A. Law List
The B. A. Law List Company
414 Colby-Abbot Bldg.,
759 North Milwaukee Street
Milwaukee 2, Wisconsin

The Clearing House Quarterly
Attorneys National Clearing House Co.
1645 Hennepin Avenue
Minneapolis 3, Minnesota

The Columbia List
The Columbia Directory Company, Inc.
320 Broadway
New York 7, New York

The Commercial Bar
The Commercial Bar, Inc.
521 Fifth Avenue
New York 17, New York

The C-R-C Attorney Directory
The C-R-C Law List Company, Inc.
50 Church Street
New York 7, New York

Forwarders List Of Attorneys
Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

The General Bar
The General Bar, Inc.
36 West 44th Street
New York 36, New York

The International Lawyers
International Lawyers Company, Inc.
33 West 42d Street
New York 18, New York

The National List
The National List, Inc.
75 West Street
New York 6, New York

Rand McNally List Of Bank-Recommended Attorneys
Rand McNally & Company
P.O. Box 7600
Chicago 80, Illinois

Wright-Holmes Law List
Wright-Holmes Corporation
225 West 34th Street
New York 1, New York

General Law Lists

American Bank Attorneys
American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

The American Bar
The James C. Fifield Company
121 West Franklin
Minneapolis 4, Minnesota

The Bar Register
The Bar Register Company, Inc.
One Prospect Street
Summit 1, New Jersey

Campbell's List
Campbell's List, Inc.
905 Orange Avenue
Winter Park, Florida

The Lawyers Directory
The Lawyers Directory, Inc.
17 South High Street
Columbus 15, Ohio

The Lawyers' List
Law List Publishing Company
111 Fifth Avenue
New York 3, New York

Russell Law List
Russell Law List
10 East 40th Street
New York 16, New York

General Legal Directory

Martindale-Hubbell Law Directory
Martindale-Hubbell, Inc.
One Prospect Street
Summit 1, New Jersey

Insurance Law Lists

Best's Recommended Insurance Attorneys
Alfred M. Best Company, Inc.
75 Fulton Street
New York 38, New York

Hine's Insurance Counsel
Hine's Legal Directory, Inc.
38 South Dearborn Street
Chicago 3, Illinois

The Insurance Bar
The Bar List Publishing Company
State Bank Building
Evanston, Illinois

The Underwriters List
Underwriters List Publishing Company
308 East Eighth Street
Cincinnati 2, Ohio

Probate Law List

Sullivan's Probate Directory
Sullivan's Probate Directory, Inc.
84 Cherry Street
Galesburg, Illinois

State Legal Directories

The following state legal directories published by The Legal Directories Publishing Company, 1072 Gayley Avenue, Los Angeles 24, California:

Arkansas and Louisiana Legal Directory
Carolinas and Virginias Legal Directory
Delaware-Maryland and New Jersey Legal Directory
Florida and Georgia Legal Directory
Illinois Legal Directory
Indiana Legal Directory
Iowa Legal Directory
Kansas Legal Directory
Kentucky and Tennessee Legal Directory
Minnesota, Nebraska, North Dakota and South Dakota Legal Directory
Missouri Legal Directory
Mountain States Legal Directory (for the States of Colorado, Idaho, Montana, New Mexico, Utah and Wyoming)
New York Legal Directory
Ohio Legal Directory
Oklahoma Legal Directory

PACIFIC COAST LEGAL DIRECTORY
(for the States of Arizona, California, Nevada, Oregon and Washington)
PENNSYLVANIA LEGAL DIRECTORY
TEXAS LEGAL DIRECTORY
WISCONSIN LEGAL DIRECTORY

Foreign Law Lists

CANADIAN CREDIT MEN'S COMMERCIAL LAW AND LEGAL DIRECTORY
Canadian Credit Men's Trust Association, Ltd.
12 Berryman Street
Toronto 5, Ontario, Canada

CANADIAN LAW LIST
Cartwright & Sons, Ltd.
2081 Yonge St.
Toronto 12, Ontario, Canada

BUTTERWORTHS EMPIRE LAW LIST
Butterworth & Co. (Publishers) Ltd.
88 Kingsway
London W. C. 2, England

THE INTERNATIONAL LAW LIST
L. Corper-Mordaunt & Company
Pitman House
Parker Street
London, W. C. 2, England

KIME'S INTERNATIONAL LAW DIRECTORY
Kime's International Law Directory, Ltd.
4 New Zealand Avenue
London, E. C. 1, England

The Fifth Amendment

(*Continued from page 310*)

The Association of American Universities says that "invocation of the Fifth Amendment places upon a professor a *heavy burden of proof* of his fitness to hold a teaching position and lays upon his university an *obligation to reexamine his qualifications* for membership in its society." (Italics added.)

If our Professor *X* has publicly renounced all of his "front" connections, changed his position with respect to matters paralleling the Communist Party line, and returned to his church, he has furnished considerable evidence of his separation from Communism. The university cannot, however, insist that he do all of these things because questions of freedom of speech and of religion are involved. The one piece of evidence that the university can require without criticism is that he waive his privilege, and cooperate with the congressional committee. Moreover, this is the best evidence that he can supply, as it is almost invariably impossible for him to furnish direct evidence.

That he ought to waive the privilege is plain from the statement of the Association of American Universities, which says that "If he is called upon to answer for his convictions it is his duty as a citizen to speak out. It is even more definitely his duty as a professor." Unless he does it, he has not sustained the required "heavy burden of proof".

Normally, such a course is not unduly harsh for a truly reformed Communist. No one taking it has been known to be prosecuted because of information so revealed. On the other hand, if the risk of prosecution is so great that a witness is unwilling to assume it, he can hardly complain if those whom he asks to retain him in a position of trust are unwilling to assume the correspondingly great risk that he has not sincerely reformed.

It is sometimes claimed that a non-Communist who has a number of "front" connections may properly claim the privilege because if he denies he is a Communist he may have to state, and explain, his "front" connections. But if he is entitled to claim the privilege when asked about such "front" connections, and this seems questionable, there is no real reason why he would be precluded from doing so by truthfully denying Communist Party membership. It is suggested, however, that if he denies Communist membership he may have to confess his "front" connections to forestall a prosecution for perjury. The reasoning appears to be that other witnesses might reveal his membership in enough Communist fronts to provide apparent proof that he is a Communist, and that by confessing them now, he could explain away this appearance. But to confess his "front" connections would be incriminating. Therefore, it is said, to obtain adequate protection he must refuse even to state whether he is a Communist, although the answer is really "No".

This argument presupposes that he has so many "front" connections that he can be judicially found to be lying when he says he is not a Communist. In effect, this means that he might be found to be a Communist in a criminal proceeding where the heavy burden of proof is on the other side. If this is the case, he should not be on the faculty because he could hardly be exonerated in a university hearing, where, as the Association of Universities states, the heavy burden of proof should be on him.

It is entirely clear that the Fifth Amendment does not excuse a witness because his testimony might expose him to charges of perjury. Statutes which preclude claim of the Fifth Amendment by granting immunity from prosecution customarily provide that such immunity shall not extend to prosecutions for perjury committed in the course of testimony compelled thereunder. Such a statute (27 Stat. 443) was held constitutional in *Brown* v. *Walker*, 161 U.S. 591 (1896), and in *I.C.C.* v. *Baird*, 194 U.S. 25 (1904).

Other explanations offered on behalf of the pleader of the privilege, such as bad legal advice, fear and confusion, and the protection of one's friends and associates, necessarily imply abuse of the privilege. Where bad advice and fear are involved, the door is always open for the witness to reverse himself and offer the desired testimony. It would not seem unreasonable to require him to do this after he has, presumably, had an opportunity to receive good advice and to recover from his fears. It is particularly disconcerting to hear it said that, even after his conference with university authori-

ties, he is still suffering from bad advice.

When a witness pleads the Fifth Amendment only to avoid identifying other people, and not to protect himself, he is clearly abusing the privilege. As was stated in *Brown* v. *Walker,* 161 U.S. 591, 600 (1896), "Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of sheltering his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

In this connection no distinction exists between the claim of the privilege in judicial proceedings and in congressional inquiries. It is just as much a part of civic duty to aid in the making of laws and in the investigation of their enforcement as it is to aid in the enforcement itself. As the Association of American Universities states: "It is clearly the duty of universities and their members to cooperate in official inquiries. . . . When the powers of legislative inquiry are abused,[6] the remedy does not lie in non-cooperation or defiance; it is to be sought through the normal channels of informed public opinion."

Another argument made is that a witness may be able safely to answer many questions, but pleads the privilege in order to avoid waiving it as to those which he cannot. The implication here is that he has done nothing really bad, but there is some inconsequential incriminating fact in his past, which he prefers not to reveal. For example, Professor Y may never have been a Communist, but at one time did, innocently, join a Communist front. The argument made is that he would like to avoid admitting this innocent, but embarrassing front connection; that to avoid waiving his privilege in this regard he must also claim the privilege when asked if he is a Communist.

There is no validity to this argument. In *United States* v. *Nelson,* 103 Fed. Supp. 215 (U.S. D.C. 1952), it was held that *admission* of membership in the Communist Party does not constitute a waiver of the privilege to refuse to give details regarding Communist activities and associations. Obviously then, it is not a waiver to *deny* membership.

The test of whether the privilege has been waived is stated clearly enough in *Rogers* v. *United States,* 340 U.S. 367 (1951). There it was held that a witness, by admitting that she was an *officer* (as opposed to a member) of the Communist Party had waived the privilege to such an extent that she could be required to identify the person to whom she had given the party's books. The test, as stated by the Court (page 374) is whether the answer to the particular question "would subject the witness to a 'real danger' of *further* crimination". If a witness merely denies Communist membership, he has not yet incriminated himself at all and every incriminating answer would "further" incriminate him.[7]

It has also been asserted that the Supreme Court's decision in *Burdick* v. *U. S.,* 236 U.S. 79 (1915), is inconsistent with the conclusions expressed here. The assertion is based on the Court's statement (page 94), "If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law."

Actually there is no inconsistency. The question in the case related to the effect, on the privilege, of a presidential pardon. Burdick, who was a newspaper man, had refused to answer questions about the sources of his information for, and his instructions to reporters respecting, certain articles on customs frauds. The Court held that he was entitled to refuse the pardon and to continue to claim the privilege.

Burdick's contention, as outlined in his brief (Supplemental Brief for Plaintiff in Error, pages 8-9), was that the information could have been obtained criminally, as by bribery or in conspiracy to defraud the government. His counsel pointed out, however, that he was not necessarily guilty of crime since he could have received the information by innocent means. Although Treasury Department employees were forbidden (by administrative order) to give such information without authority, there was no law prohibiting Burdick from accepting or publishing it. It was claimed that the answers would have furnished a link in a chain of evidence required to prosecute Burdick for bribery or conspiracy, but that they did not necessarily implicate him in a crime.

The questions in the *Burdick* case were not susceptible of "Yes" or "No" answers. Any answer would, at least on Burdick's assertion, have been incriminating, not because it would have revealed commission of a crime, but because it would have revealed "a link in a chain of evidence" necessary to prosecution for crime. These questions were, therefore, quite dissimilar to the question whether one is or was a Communist, where the only answer is "Yes", or "No", and "Yes" is the only incriminating one.

If there ever was any question of the Supreme Court's opinion with regard to the *extra-judicial* inference that should be drawn from the refusal to state whether one is a Communist, it has been well answered by Justice Jackson, speaking in the majority opinion in *Orloff* v. *Willoughby,* 345 U.S. 83, 91 (1953):

> No one, at least no one on this Court which has repeatedly sustained the assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself would incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No".

6. No implication is intended that these powers have, or have not, been abused in any case.

7. See also *Arndstein* v. *McCarthy,* 254 U.S. 71, 72 (1920).

Make Your Hotel Reservation Now!

■ The Seventy-Eighth Annual Meeting of the American Bar Association will be held in Philadelphia from August 22 to August 26, 1955. Further information with respect to the schedule of meetings appears in the February issue of the JOURNAL beginning at page 152.

Attention is called to the fact that many interesting and worthwhile events of the meeting will be arranged, as usual, to take place on Saturday and Sunday, August 19 and 20, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 22.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago, 37, Illinois, and should be accompanied by a payment of $10.00 registration for *each lawyer* for whom reservation is requested. *Be sure to indicate three choices of hotels* and give us your definite date of arrival as well as probable departure date. *All space at the Bellevue-Stratford and Barclay Hotels is now exhausted.*

More detailed announcement with respect to the making of hotel arrangements may be found in the January issue of the JOURNAL at page 11.

Administrative Procedure

(Continued from page 314)

nent portions of the statutes, rules and practices of the ten sample agencies. Finally, the subjects selected were assigned to various members of the committee for the preparation of individual reports to be reported back and considered by the full committee.

The report of the Committee on Uniform Rules, pointing out the possibilities and problems of procedural uniformity, as illustrated by its sample studies, represents the most extensive exploration to date into the possibility of formulating uniform rules of administrative procedure.

"We felt", Mr. Herbert stated, "that we had to consider first to what extent we needed or desired uniform rules. In other words, we had to consider the price we were willing to pay for uniformity. We recognized at all times that the present diversity in agency rules of procedure does not impose any crushing burden on the practicing Bar. Nevertheless, the further we went, the more we felt that the opportunities for uniformity were practically undeveloped."

The comparative study of the statutes and agency rules made by the committee quickly revealed, according to Mr. Herbert, that there has been a great deal of copying by draftsmen, and this copying alone has produced a certain degree of imitative uniformity. This development provided a point of departure for the committee's work. In addition, in each case in which a study was made, the corresponding provisions, if any, of the Rules of Civil Procedure were also taken into account.

The committee's first recommendation, which was approved unanimously by the Conference, is that it is both "feasible and desirable to formulate uniform rules for many aspects" of procedure in federal administrative proceedings governed by Sections 7 and 8 of the Administrative Procedure Act. Chairman Herbert stated it to be the conclusion of his committee "that it is feasible to provide in such proceedings for more uniformity than is presently provided by the Administrative Procedure Act itself".

The Committee on Uniform Rules also submitted a recommendation, based upon its sample studies, that it would be feasible and desirable to formulate uniform rules on the following aspects of procedure: computation of time, service of process, subpoenas, depositions and interrogatories, official notice, presumptions, stipulations and admissions of record in proceedings involving numerous parties, form and content of decisions, and appeals from intermediate decisions.

The Committee prepared, as a part of this recommendation, illustrative uniform rules on these subjects.[5] "We do not suggest", Mr. Herbert said, "that any of these illustrative rules is the best that can be drafted. Indeed, we insist that the final formulation of any uniform rule should be preceded by more extensive consultation with the agencies and the Bar than has been possible for us. We feel, however, that no matter how uniform rules are formulated and put into effect three practical principles should be kept in mind: (1) The formulation of such rules must be preceded by spade work; (2) they must be evolved in close cooperation with the agencies and the Bar; and (3) there must be provision for continuous study and revision, such as we have for the Rules of Civil Procedure, rather than a one-shot operation such as our committee has been." The Conference unanimously approved the recommendation "without approval or disapproval . . . of any specific provision" of the illustrative rules.

The Committee concluded its work, "strongly of the view that the formulation of uniform rules is too extensive and complicated a task for any *ad hoc* group, and with the belief that an Office of Administrative Procedure, such as was recommend-

5. The text of the illustrative rules is contained in the Committee's Report and included in the final report of the Conference now ready for circulation.

ed by the Conference at its session in October, 1953, might well act as a nucleus for further study in developing uniform rules of procedure."

Agency Rules . . . *Three Suggestions*

The Conference also adopted three additional recommendations of the Uniform Rules Committee relating to the identification, citation and reproduction of agency rules. They are not intended as rules of procedure, but as suggestions for agency policy and practice.

The first of these recommendations urges that the reprints of rules which have been published in the *Federal Register* be identified and numbered in the same system as that used in the *Register*. "This Conference," Mr. Eberhart, Assistant Director of the *Federal Register*, explained, "should go on record as favoring a policy that would eliminate dual numbering and assure the uniform identification of rules having the force and effect of law." The second recommendation urges uniform citations or references to agency rules.

The last of the recommendations of the Uniform Rules Committee relates to methods of reproducing rules required to be published in the *Federal Register*. On behalf of the Committee, Mr. Eberhart said, "In exploring the benefits to be derived from the uniform identification and uniform citation of rules, it was discovered that it is possible to effect almost incredible savings in printing costs." The recommendation is that whenever separate prints of rules which have been published in the *Federal Register* are required, such prints should be reproduced directly or photographically from the official *Federal Register* text. Actual or photographic identity saves costs and eliminates the possibility of error. It is the system presently in use for enrolled bills, the United States Slip Laws, and the United States Statutes at Large. The Conference approved the policy and adopted all three of the Committee's recommendations in this group.

Consideration was next given to the recommendations of the Committee on Evidence, presented by Chairman Emory T. Nunneley, Jr., the General Counsel of the Civil Aeronautics Board and delegate from that agency. The recommendations of his committee at the earlier Conference session had been addressed solely to the problem of evidence normally submitted in written form.[6] "In the interim," he said, "we have gone on to examine the question of whether we should recommend imposing a requirement that additional areas of testimony be submitted in written form. We concluded that there were significant additional areas in which testimony lends itself to submission in written form." The committee directed its attention to the area of expert or opinion testimony.

As a first step, the committee recommends that hearing officers attempt to have the parties agree upon the witness who is to give expert or opinion testimony, and, if this cannot be done, then require the parties to submit in advance of the hearing the names, addresses and qualifications of the witnesses to be used in order that parties may investigate their qualifications.

It was recommended further that direct testimony of opinion or expert nature or that which is based on economic or statistical data be reduced to writing for submission in advance, such statements to be subject to any objection at the hearing, with the exception of objection that the evidence was not presented orally. Such submission would be subject to cross-examination only when notice is given sufficiently in advance to insure the presence of the witness who testified. The Committee recommended, finally, that the agencies require that where the evidence thus described is not submitted in advance it shall not be received in the absence of a showing of good cause.

All of these recommendations concerning expert or opinion evidence were approved and the Committee on Evidence next recommended an amendment to Section 7 (c) of the Administrative Procedure Act. This consisted of a suggested substitute for the last sentence of Section 7 (c), which would provide—

> Any agency may in all types of cases, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence exclusively in written form, or, if the agency so desires, in written form as a supplement to oral presentation.

The effect of this proposed amendment would be to extend to all types of cases the power which Section 7 (c) presently gives to agencies to require submission of evidence in written form (where parties will not be prejudiced) in rule making and in proceedings involving claims for money or benefits and applications for initial licenses.

A letter to Chairman Nunneley from Assistant Attorney General Stanley Barnes, in charge of the Antitrust Division, was read to the Conference. It expressed "vigorous opposition" to the proposal to amend Section 7 (c). "If the agencies were permitted to and did adopt procedures requiring the submission of all evidence exclusively in written form," he wrote, "this would deprive the proponent of a witness of the right to have the credibility and reliability of the witness tested by his appearance and manner in giving evidence, which will often be strong if not decisive factors in the weight attributed to such evidence." The proposal to amend Section 7 (c) of the Administrative Procedure Act was tabled by the Conference.

The last recommendation for consideration by the Conference came from the Committee on Judicial Review. It consists of the text of a proposed statute to provide for the filing of an abbreviated record in the United States Courts of Appeals on review or enforcement of the orders

6. See *First Report*, Conference called by the President on April 29, 1953, pages 11-12.

of administrative agencies pursuant to agreement by the parties or order of the court. A question arose as to why the proposal is limited to United States Courts of Appeals, omitting review proceedings in district courts. Mr. Lambert McAllister, Chairman of the Judicial Review Committee and delegate to the Conference from the Federal Power Commission, stated that the task of examining all of the statutes which provide for review in district courts is one which the Committee did not undertake in view of its limited time. In addition, he stated that his committee is of the view that the longest records are filed in the courts of appeals, rather than in the district courts, and the object of the proposal is to reduce the size of long and bulky records.

The text of the proposed statute is consistent with one which is being sponsored by the Committee on Revision of Laws of the Judicial Conference of the United States and embodies the substance of a recommendation adopted by the Conference at an earlier session.[7] The recommendation for a proposed statute was approved.

During the course of the Conference, all recommendations adopted were referred to the Committee on Style under the chairmanship of Conrad E. Snow, the delegate from the Department of State. Mr. Snow and his committee revised the wording, without affecting the substance, of each recommendation into a form suitable to the format of the Conference Report. Before closing, the Conference adopted the report of the Committee on Style and approved a resolution which calls for reconstitution of the Conference in some appropriate form which will permit it to continue as "a useful device in the improvement of administrative procedure".

Pursuant to the latter resolution the Conference has recorded its belief in the "great value of cooperative self-examination by Government agencies" and participation therein by the practicing Bar and the judiciary, as the means of achieving improvement of administrative procedure. The Conference, therefore, recommended to the President that he "constitute upon a permanent basis a conference somewhat similar to this one in organization and operation, composed of delegates from all Government agencies having adjudicatory or rule-making functions, together with appropriate numbers of federal judges and practicing lawyers, which conference would (1) conduct studies of, and make recommendations to the several agencies concerning, improvements in administrative procedure, (2) cooperate with an Office of Administrative Procedure, if established, and (3) meet not less than once a year for the aforesaid purposes".

Following these actions, the Conference called by the President on April 29, 1953, adjourned *sine die*.

A final report to contain all actions of the entire Conference beginning with the opening session, together with comments thereon, has been prepared. Copies of the final report may be obtained from the secretary of the Conference. Address Miss Patricia H. Collins, Room 5114 Department of Justice, Washington 25, D. C.

7. See Report of Conference *op cit.*, page 5.

Proceedings of the House of Delegates

(*Continued from page 335*)

▪ At the second session, the House of Delegates went on record in favor of voluntary coverage of lawyers under the Social Security Plan, thus reversing its previous opposition to Social Security for lawyers. The House also heard extended debate of a proposal of the Committee on Jurisprudence and Law Reform to endorse a constitutional amendment that would permit the states to propose amendments without action by Congress.

Second Session

▪ The House reconvened on the afternoon of Monday, February 21, for its second and longest session of the 1955 Midyear Meeting. Chairman Randall presided.

Judge Douglas L. Edmonds of California, Chairman of the Section of Judicial Administration, requested approval of changes in the bylaws of the Section. The amendments, which are as follows, were approved without debate:

1. Amend Article II, to read as follows:

Section 1. Membership. Any member of the Association, upon request to the Secretary of the Association or the Chairman of the Section, and upon payment of dues for the current year, shall be enrolled as a member of the Section.

Section 2. Dues. Each member of the Section shall, upon enrollment, pay to the American Bar Association annual Section dues of $3.00. Thereafter, said dues shall be paid in advance each year, beginning on the July first next succeeding such enrollment. Any member of this Section whose annual Section dues shall be more than six months past due shall thereupon cease to be a member of this Section.

2. That Article III, Sections 2 and 3, and Article V, Section 3, be amended to provide for a third Vice Chairman to act as an aide to the Chairman, and not to enter the line of succession. The proposed amendments are as follows:

(A) After the words "second vice chairman" add the words "third vice chairman" in Article III, Section 2, and in Article III, Section 3.

(B) Add a new Section 3 in Article V, as follows: *Section 3. Third Vice Chairman.* The Third Vice Chairman shall have such duties as may be assigned him by the chairman or the council.

The report of the Committee on Professional Ethics and Grievances was given by its Chairman, Wilber M. Brucker, of Washington, D. C.

Mr. Brucker said that his Committee has been studying the question how to publicize the Canons of Ethics better. The lawyers of the country ought to read the Canons frequently, he declared, and perhaps the courtroom is the best place to put the Canons so that they will be accessible. Accordingly, the Committee is asking the Committee on Public Relations to consider printing and framing the Canons so that they can be presented, with suitable ceremony to courts throughout the country. Implementing this plan would of course call for the co-operation of the local and state associations.

Mr. Brucker also said that the work load of the Committee is so heavy that he will ask the House to increase its size at the Annual Meeting.

The House then began consideration of the question of voluntary inclusion of lawyers under the Social Security system, one of the most controversial and most important questions decided at the Midyear Meeting.

Social Security for lawyers was extensively debated at the last Annual Meeting in Chicago, and the question was referred to the Conference of Bar Presidents with a request to poll their membership to determine the sentiment of the state and local associations. Archibald M. Mull, of California, Chairman of the Conference, reported on the results of a questionnaire sent to 1445 state and local bar associations. In summary, 607 presidents of these associations, asked their personal opinion, voted 490 in favor to 117 against inclusion. Some 366 associations had polled their members; 264 said that their members favored Social Security, 45 were opposed. Some 293 associations that had not taken a poll expressed the consensus of their presidents or executive committee as to the opinion of members in their associations; these results indicated that 222 were for and 71 against inclusion of lawyers in the program.

Joseph F. O'Connell, of Boston, Massachusetts, Delegate of the Judge Advocates Association, declared that that association had taken a poll and was in favor of inclusion. "I do not personally feel that it is a good law" he said. "I have been instructed by my Board to report the figures to you . . . out of 174 replies, 97 were for voluntary inclusion, 25 for either, 37 were for compulsory, and 15 against."

Secretary Stecher, speaking for the Board of Governors, moved that the House place the Association on record in favor of a voluntary coverage for lawyers and other professional groups under the Social Security Act. This motion was a substitute for a proposal of the Committee on Unemployment and Social Security, submitted at the Annual Meeting, which would have reaffirmed the Association's previous opposition to the program. The Committee's report was unfinished business from the last meeting.

Clifford W. Gardner, of Minnesota, said that the younger lawyers in his state were in favor of the program. These young men, he said, believed that the Association had influenced Congress not to include lawyers and have been very frank in stating that they will not support the coming regional meeting because of the Association's view. ". . . Minnesota voted overwhelmingly to favor Social Security on a voluntary basis and . . . this organization should not stand in the way of their being voluntarily covered if they so wish" he declared.

Franklin Riter, of Utah, agreed with Mr. Gardner. The young men favor Social Security, he said, and while they are misled on some of the features of the law, "the fact remains that the younger element of our profession are 80 per cent in favor of the plan and I therefore endorse this movement, although fundamentally on the problem, I am adverse to the whole thing. . . ."

Karl C. Williams, of Illinois, was strongly opposed to the Board's proposal. A poll of Illinois lawyers showed overwhelming opposition to mandatory coverage and opposition, although not so overwhelming, to voluntary coverage, he said. ". . . ours is a profession as distinguished from a vocation or calling" he declared. "It is not only that; it is a regulated profession . . . if we take this step, we are taking a step for the first time in the history of our profession in America towards regulation from without, because it will be inevitable that when we become partners with the Government in a form of security . . . we will yield in time to some other kind of regulation."

Frank W. Grinnell, of Massachusetts, announced that he was instructed to say that the Massachusetts Bar Association was in favor of the voluntary plan.

Telford B. Orbison, of Indiana, said that he had been instructed to report that the House of Delegates of the Indiana State Bar Association had voted overwhelmingly in favor of coverage.

Floyd E. Thompson, of Illinois, made perhaps the shortest speech on the question: "I'm against making socialists out of lawyers."

Osmer C. Fitts, of Vermont, said that the "grass roots" sentiment was for the program. ". . . if the people in the grass roots, the men who belong to our Associations, such as in the Vermont Association, vote five to one for inclusion, I think it is the responsibility of the spokesmen for the 56,000 members of the American Bar Association to bury their personal desires, to bury the political differences that some of you have, the same as I do, and to support the men who need it, whether they are under 36 or over 36."

Edwin M. Otterbourg, of New York, said that the New York County Lawyers Association, with more than 8,000 members, had voted overwhelmingly in favor of inclusion.

Willard G. Woelper, of New Jersey, said that his state bar association had voted unanimously in favor. "Lawyers ofttimes leave widows who need social security" he declared, and despite the $1,200 limit on earnings under the program, it is still a good one.

The House then voted to accept the Board's recommendation favor-

ing inclusion of professional men in the Social Security program.

The report of the Committee on Retirement Benefits was given by John R. Nicholson, of Illinois, a member of the Committee. Mr. Nicholson reported that the Jenkins-Keogh Bills, which would permit self-employed taxpayers to set aside part of their income tax free for retirement, had been reintroduced in Congress as H.R. 9 and 10, respectively. The Treasury Department had promised to submit an objective report on H.R. 2092, the Ray Bill, introduced to meet the objections raised by the Treasury to the Jenkins-Keogh measures. Mr. Nicholson reported that there was widespread interest in the subject. "The agitation for a constructive solution should not be allowed to die down, but should be continued with as much force as possible" he declared.

Milton J. Blake, of Colorado, reporting for the Committee on Legal Assistance for Servicemen, said that his Committee was receiving excellent co-operation from the Armed Forces. The enactment of the proposed National Reserve Program will bring many young men into service for short periods, he said, and it will be important for all of them to have their personal affairs attended to before they enter the service. State committees are urged to encourage young men to arrange their private affairs before they are called to duty. He also reported that the latest edition of the *Compendium* has been completed, and the limited number of copies available are now in the hands of legal assistance officers.

The report of the Committee on Unauthorized Practice of the Law was delivered by Cuthbert S. Baldwin, of Louisiana, a member of the Committee. He reported on the latest meetings of the various conference groups and two recent cases that resulted in eliminating some unauthorized practice in Arkansas and Arizona.

Allan H. W. Higgins, of Massachusetts, Chairman of the Section of Taxation, reported on the work of the Section in offering advice on the framing of the new Treasury Regulations that will be issued to accompany the Internal Revenue Code of 1954.

Robert M. Benjamin, of New York, Chairman of the Administrative Law Section, offered four resolutions for adoption by the House. The first of these amended the Section's by-laws and was adopted without debate:

1. RESOLVED, That Article III, Section 2, of the By-laws of the Section of Administrative Law be amended to read as follows:

Section 2. There shall be a Council, which shall consist of the Chairman, the last retiring Chairman, the Vice Chairman, the Secretary, and the Section Delegate, all of whom shall be members ex officio, together with eight other members to be elected by the Section as hereinafter provided.

2. RESOLVED, That Article III, Section 3, of the By-laws of the Section of Administrative Law be amended to read as follows, such amendment to be applicable to the officers elected at the 1954 annual meeting and thereafter:

Section 3. The Chairman, Vice Chairman and Secretary shall be nominated and elected in the manner hereinafter provided, and shall hold office for a term of one year and thereafter until their successors shall have been elected and qualified.

3. RESOLVED, That Article IV, Section 1, of the By-laws of the Section of Administrative Law be amended to read as follows:

Section 1. Nominations. At the first session of the Annual Meeting the Chairman shall appoint a Nominating Committee of three members of the Section not members of the Council, which Committee shall make and report nominations to the Section each even-numbered year for the office of Section Delegate, and each year for the offices of Chairman, Vice Chairman and Secretary and for members of the Council to succeed those whose terms will expire at the close of the then annual meeting and to fill vacancies then existing for unexpired terms, except in the case of the Section Delegate, whose selection is made by the Council in accordance with Article VI, Section 3, of these by-laws. Other nominations for the same offices may be made from the floor.

4. RESOLVED, That Article VI, Section 1, of the By-laws of the Section of Administrative Law be amended to read as follows:

Section 1. The Council shall have general supervision and control of the affairs of the Section subject to the provisions of the Constitution and By-laws of the American Bar Association and the By-laws of this Section. During the interval between meetings of the Section, the Council shall have full authority to act for the Section in any way in which the Section itself would be authorized to act, and any such action taken by the Council pursuant to this provision shall be reported to the members of the Section at the next annual meeting of the Section. The Council shall especially authorize all commitments or contracts which shall entail the payment of money, and shall authorize the expenditure of all moneys appropriated for the use or benefit of the Section. It shall not, however, authorize commitments or contracts which shall entail the payment of more money during any fiscal year than the amount which shall have been previously appropriated to the Section for such fiscal year.

The second resolution of the Section was as follows:

RESOLVED, (a) That the American Bar Association disapproves S. 3142, 83d Congress, in the form in which it was introduced;

(b) That the American Bar Association approves and recommends the enactment of Titles I and II thereof to establish a Commission on Ethics in Government, empowered to conduct hearings, study applicable laws, make specific recommendations concerning the improvement, and maintenance at a high level, of the moral standards of official conduct of elective and appointive officials, officers and employees of the United States;

(c) That the American Bar Association approves in principle the substance of Titles III and IV of said S. 3142;

(d) *That the House of Delegates authorizes the President of the American Bar Association to appoint a special committee of the Association on Standards of Ethical Conduct for Public Officials for the purpose of supporting legislation providing for the establishment of a Commission on Ethics in Government, and of counseling*

with any such Commission as may be so established;

(e) As an alternative to (d) above —That the American Bar Association refer to the Committee on Civil Service the function and authority set forth in said paragraph (d) above.

Mr. Benjamin explained that S. 3142 contains some matters which the Section is not yet ready to recommend, but the Section is in favor of the general policy of the bill. A similar measure was approved by the House at its 1953 Midyear Meeting. At that time, the Section recommended that a Special Committee be appointed to give detailed consideration to the proposal. The House had been unwilling to create a special committee and had referred the matter back to the Section. Mr. Benjamin said that the Section was still of the opinion that "this is a matter not appropriate for consideration by a Section, but rather by a committee, that detailed consideration of a bill of this kind can best be handled in that way . . . ."

Secretary Stecher, speaking for the Board of Governors, moved that the fourth paragraph of the resolution, labeled (d) (italicized above) be stricken, and the alternative paragraph (e) be adopted instead. This amendment was accepted by Mr. Benjamin, and the House thereupon voted to adopt the resolution as so amended.

The Section's third resolution, proposed by Mr. Benjamin, was as follows:

RESOLVED, That the American Bar Association is opposed to the proposal that has been seriously pressed at the past session of the Congress to transfer jurisdiction over unfair labor practice cases from the National Labor Relations Board to the Federal District Courts; and

FURTHER RESOLVED, That the Section of Administrative Law be authorized to take appropriate action to make this opposition effective.

Mr. Benjamin said that this proposal had been referred to the Section of Labor Relations Law which was unanimous in agreeing with the Administrative Law Section's position. One good reason for retaining the Labor Relations Board's jurisdiction is the importance of having centralized adjudication, and thus some uniformity, in unfair practice cases, Mr. Benjamin said.

The House voted to adopt the resolution.

The Administrative Law Section's last resolution was this:

RESOLVED, That the American Bar Association urges the repeal of Title V, entitled "Fees and Charges", of the Independent Offices Appropriations Act, 1952, 65 Stat. 268, 290; and

FURTHER RESOLVED, That in the opinion of the American Bar Association no schedule of agency fees and charges of the character specified in said Title V should be adopted unless first authorized by specific legislation dealing with the particular subject matter or agency; and

FURTHER RESOLVED, That the Section of Administrative Law be authorized to take appropriate action in behalf of the Association to make these views effective.

Mr. Benjamin declared that the present policy is to prepare schedules of fees for federal licensing activities so as to recover the cost incurred in the conduct of the activity. It was felt that other aspects of the individual cases should be considered and that Congress should either authorize fees to be charged on a detailed basis or at least state the manner in which the agencies could determine what fees to charge.

Mr. Benjamin concluded his report by directing attention to the Hoover Commission Reports, particularly that of the Task Force on Legal Procedures, which will soon be released. He urged the members of the House to study the Commission recommendations, when released, and send in their comments to the Section.

The resolution was adopted without further debate.

William J. Jameson, of Montana, Chairman of the Committee on Professional Relations, made a report of the progress of negotiations with the American Institute of Accountants. No detailed report was possible, he said, because negotiations were still going on. He summarized the history of the controversy, which arose over attempts to amend Treasury Circular 230, relating to practice before the Treasury Department, and said that he hoped the current negotiations would be concluded satisfactorily to all. Mr. Jameson's statement to the House appears in this issue of the JOURNAL beginning at page 318.)

Mr. Jameson proposed the following resolution:

RESOLVED, That the Special Committee be continued and be designated the Committee on Professional Relations, and that the President be authorized to determine the number and terms of its members.

FURTHER RESOLVED, That the Committee on Professional Relations be authorized to continue negotiations with the American Institute of Accountants and, at its discretion, to negotiate with other groups in an effort to reach an agreement, subject to the approval of the House of Delegates with respect to problems arising in tax practice, as well as administrative practice generally;

FURTHER RESOLVED, That the Committee be authorized to oppose the enactment of H. R. 1601 and H. R. 2416, introduced in the 84th Congress, and similar legislation, and to urge the retention of the provisions of Section 10.2 (F) in Circular 230 with respect to practice before the Treasury Department.

The resolution was adopted without further debate.

The House then turned its attention to the report of the Committee on Jurisprudence and Law Reform, given by the Committee's Chairman, William Logan Martin, of Alabama. This report evoked the longest debate at this meeting of the House.

Mr. Martin proposed this resolution:

RESOLVED, That the American Bar Association approves and recommends adoption by the Congress of the United States and subsequent ratification by the legislatures of the several states of Senate Joint Resolution 45, as introduced in the 84th Congress, First Session, or in substantially the same form, proposing an amendment to the Constitution of the United States providing for compulsory retirement at age 75 of members of the Supreme Court of the United States and the termination at the same age of regular active service by judges of all inferior courts, disqualifying a

member of the Supreme Court of the United States appointed after the ratification of this amendment from holding either the office of President or of Vice President of the United States while in regular active service or within five years after ceasing to be in regular active service, and authorizes and directs the Standing Committee on Jurisprudence and Law Reform to advocate by all appropriate means its submission by the Congress of the United States and its ratification by the states.

A similar measure, with some differences, had been approved by the House at the Boston and Chicago Annual Meetings. The present form of the proposal, however, was enough-different that the Committee preferred to bring the matter to the House again.

Ben R. Miller, of Louisiana, said that men appointed to the federal bench at 63 or 64 would, under the proposal, be eligible for pensions after only a few years of service. "I question the wisdom of having such a drastic provision in a constitutional and inflexible document" he said. "This seems to me to be a subject for legislation, and not for a constitutional amendment."

Mr. Martin replied that there is no provision now regarding the age at which a judge may be appointed.

The House then voted to adopt the resolution.

Mr. Martin then offered his second resolution, which would have put the Association on record as favoring an amendment of the amending clause of the Constitution. The purport of this proposal, known as the Reed-Walter Amendment, would be to add to the present provisions for amending the Constitution, the following third method: ". . . or the legislature of any state, whenever two thirds of each House shall deem it necessary, may propose amendments to this Constitution by transmitting to the Secretary of State of the United States, and to the secretary of state of each of the several states, a certified copy of the resolution proposing the amendment, which shall be deemed submitted to the several states for ratification when certified copies of resolutions of the legislatures of any twelve of the several states by two thirds of each house shall have been so transmitted concurring in the proposal of such amendment."

Mr. Martin said that one state might propose an amendment; if twelve states concurred in the proposal, it would then be submitted to all the states. It would become part of the Constitution when thirty-six states had ratified it, without the intervention of Congress. A second clause in the proposal provides that the act of proposal, concurrence in a proposal, or ratification of an amendment, should not be revocable. Another clause of the proposal made controversies respecting the validity of an amendment justiciable by the exercise of the judicial power of the courts.

In presenting this proposition, Mr. Martin said that, under the present system of amendment, Congress can block any change in the Constitution simply by refusing to act. "Congress may become so powerful that it would never submit an amendment" he warned. "In the past twenty years, beginning in 1933, we have seen an accumulation of power in Washington, usurped from the states, permitting of a great centralized government which the states are powerless today to change . . . would Congress submit to an amendment to limit its own powers?"

William B. Cudlip, of Michigan, opposing the resolution, objected to the fact that Congress would have nothing whatever to say about a constitutional amendment. "Ours is a federal republic" he declared. "We have a dual type of government. We are citizens of each of our respective states and the federal government . . . ." The proposal goes "right to the heart and core of our whole system of federal government".

Mr. Martin replied that, under the present provisions, Congress is impotent when a convention is called to propose amendments.

Frank W. Grinnell, of Massachusetts, called the proposal a "dangerous proposition in the direction of weakening the structure of the Federal Government". ". . . to put the initiation of constitutional amendments to the Federal Constitution in the hands of twelve states, with the way in which the legislatures operate—sometimes on a wave of emotion, sometimes on slogans, and frequently because they are too bored to read something, is not a careful way to deal with the Constitution . . ." he declared.

Mr. Martin asked what Mr. Grinnell proposed to do about the concentration of power in Washington. Mr. Grinnell replied: "I think the only remedy is to trust the gradual balance of judgment of the American people not to go too much farther than they have gone already. I doubt it can be done by monkeying with the paper arrangement under which we have been governed so far."

Cloyd LaPorte, of New York, said that this proposal had been consid-

ered by a committee of the New York State Bar Association, which unanimously opposed it. Among the members of the committee were former Attorney General William D. Mitchell, John W. Davis, Arthur H. Dean, Harrison Tweed and Cornelius Wickersham. He objected that the proposal would deprive the people of one single forum in which the merits of a proposed amendment could be debated. Under the present system, in which amendments are proposed by Congress, he said, "You have a forum in which the people from all sections are represented. They can write and speak to their Congressmen, the press can debate the matter, and it is out in the open. . . . if you go the rounds of the states, the matter may get very far along without any general debate, without any focusing of the thought of the entire country on the matter."

Another objection was raised by Arthur H. Dean, of New York, who made the same point. "The debates in Congress are well covered by the newspapers, by radio and television. They are well reported. . . . If this amendment were adopted, these very serious constitutional amendments would be debated seriatim in the legislatures of the several states. The rest of the people would not be entitled to be present . . . what would be discussed in one legislature might not be discussed in another legislature." "This amendment provokes sectionalism with a vengeance and I submit to you if it is adopted, it will be the beginning of the undermining of the Constitution."

John C. Satterfield, of Mississippi, speaking in defense of the resolution, declared that it had had long and serious study by the committee. ". . . this provision does provide not one, but forty-eight public discussions" Mr. Satterfield said. ". . . the discussion in those bodies [the state legislatures] by those persons directly in touch with the people of the United States whom they represent will be a sufficient discussion. . . ."

Judge Floyd E. Thompson, of Illinois, declared that the proposal struck at "the very heart of our whole constitutional system of government. It is out of tune with the whole philosophy of the Government of the United States of America." Judge Thompson argued that the people, not the states, had adopted the Constitution. The proposal would permit the legislatures to alter the Constitution without giving the people any opportunity to pass on the question.

Former Congressman Hatton W. Sumners, of Texas, speaking against the proposal, asked "How are you going to prevent the people from surrendering and prevent the Federal Government from usurping power by passing another constitutional amendment? . . . As long as you can leave a people of a country free to exercise their own judgment, that is about all you can do in a democracy. . . ."

Charles M. Lyman, of Connecticut, speaking in favor of the proposal, argued that when twelve states felt they were burdened by some constitutional questions, they ought to be able to do something about it. He pointed to the Reed-Dirksen Amendment, limiting the power of Congress to levy income taxes, as one example of an amendment wanted by the states that Congress has so far refused to submit for ratification. "The debates in the state legislatures . . . would certainly be widely reported and it would be known to the people as if it had happened in Congress. . . ."

In closing the debate for the Committee, Mr. Martin declared: "I think the states are still part of this country, stripped as they be of many of their powers. . . . The states have their representatives in the Senate and in the House, but it is the people of the states who can watch more closely the actions of their own legislatures than they can those in Washington of the Congress. . . . The situation in Washington today is intolerable" Mr. Martin said. ". . . this is the method to turn . . . and to bring back to the states, and back to the people, the powers they have lost."

The House then voted on the proposal. It was defeated, 93 against to 64 for. (During the third session, the House voted to rescind this action and to refer the proposal back to the Committee on Jurisprudence and Law Reform. See *infra*.)

Willoughby A. Colby, of New Hampshire, Chairman of the Section of Bar Activities, then proposed the following recommendation approving an amendment of the Section's by-laws making it a dues-paying Section. The recommendation was adopted without debate:

> That the by-laws of the Section of Bar Activities be amended by striking out present Section 1 of Article II and by inserting in lieu thereof the following:
>
> *Section 1.* Each member of this Section shall pay to the American Bar Association annual dues of $2. Any member of the Section, upon request to the Secretary of the Association, and upon the payment of dues for the current year, shall be enrolled as a member of this Section. Thereafter said dues shall be paid in advance each year beginning on the July first next succeeding such enrollment. Any member of this Section whose annual dues shall be more than six months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section.

John C. Goins, of Tennessee, then moved that the House reconsider its vote favoring a Special Committee on Trial and Appellate Practice to arrange institutes and panels on trial and appellate practice at Regional and Annual Meetings.

Urging the House to reverse its action, Allan H. W. Higgins, Chairman of the Section of Taxation, said that he had talked to at least a dozen Section chairmen who were disturbed at placing trial panels in the hands of a Special Committee. "The Sections are in a better position to know what the members of the Sections would like to hear in the line of a mock trial . . . than a general over-all committee" he said.

Clifford W. Gardner, of Minnesota, objected to reconsideration. He declared that no one represents "plaintiffs" in the Association and

that this was another effort to smother their voice.

Charles S. Haight, of New York, President of the Maritime Law Association, declared that he felt very strongly that any trial panels on maritime law could best be handled by that association, not an over-all committee.

Harold H. Bredell, of Indiana, said that he had voted in favor of the Committee earlier, but was in favor of reconsideration now so as to permit those who were disturbed about the proposal to frame an appropriate amendment.

George H. Beechwood, of Pennsylvania, said that the resolution did not call for a committee to investigate and report. "It calls for the appointment of a committee with absolute power to control panel tactics procedure. . . . [It] goes to the heart of the activities of every Section putting on any kind of program."

On the vote to reconsider, the vote was 101 in favor, 50 opposed.

On Mr. Otterbourg's motion, the House then voted to recommit the resolution to the Committee on Scope and Correlation.

Judge Orie L. Phillips, of Colorado, reporting for the Special Committee on Disciplinary Procedures, said that his Committee had prepared the final draft of the proposed Rules of Court for Disciplinary Proceedings. He withdrew resolutions calling for approval of the Rules at the request of the Board of Governors, which felt that there should be more time for state and local associations to study the proposals and submit comments.

Judge Phillips then moved the following, which was adopted without debate:

> That the Committee be continued and be authorized to study and report on recommendations with respect to to disciplinary procedures in the report of the Survey, Conduct of Judges and Lawyers, pages 85-129, inclusive, which has been referred to this Committee by the Committee on Scope and Correlation.

The report of the Section of Antitrust Law was delivered by Thomas E. Sunderland, of Illinois, the Section Delegate. Mr. Sunderland proposed the following:

> RESOLVED, That the American Bar Association opposes the adoption by the United States of the proposals in the report of its Ad Hoc Committee on Restrictive Business Practices to the United Nations Economic and Social Council (for the reasons stated in the Report of the Association's Section of Antitrust Law, Committee on International Restrictive Business Practices) and urges that at the spring, 1955, meeting of the United Nations Economic and Social Council the United States express its refusal to be a party to such proposals.
>
> FURTHER RESOLVED, That a copy of the resolution be sent to the Secretary of State and the United States' Delegate to the United Nations.

Mr. Sunderland explained that the basic proposal would set up a tribunal patterned after the Federal Trade Commission to have jurisdiction over practices deemed to restrain competition in international trade. While the Section is vigorously opposed to cartels, it was against this proposal for several reasons: (1) Many nations have no antitrust laws. Since decisions of the tribunal would be implemented in accordance with the law of the various countries, American business would be at an unfair disadvantage when decisions could be enforced only against it and not against other businesses competing; (2) The proposal discriminates against private enterprise, since government-controlled enterprises restricting international trade would not be subject to the commission's investigative procedures; (3) There is no provision for due process or the appointment of impartial judges.

The House voted to adopt the resolution.

Daniel P. Loomis, of Illinois, had four resolutions to offer to the House on behalf of the Section of Labor Relations Law.

The first was an amendment of the Section's by-laws which would have made past chairmen of the Section ex officio members of the Council, without the right to vote.

Mr. Loomis withdrew this proposal after Secretary Stecher said that the Board of Governors recommended that it not be adopted. The arrangement was a departure from the practice among the Sections of the Association and would tend to make the Council unwieldy in future years.

The Section's second resolution was as follows:

> RESOLVED, That the American Bar Association supports the following changes in the Rules of Procedure of the National Labor Relations Board:
>
> 1. Amend Section 102.20 to eliminate the requirement that the respondent plead an affirmative defense.
> 2. Amend Section 102.21 to eliminate the requirement that the answer be sworn and that a power of attorney be attached.
> 3. Amend Section 102.38 to limit to members of the Bar the right to appear before the Board in a representative capacity in proceedings under Section 10 following the issuance of a complaint.
> 4. To permit the trial examiner in unfair labor practice cases to fix an appropriate time for filing briefs which may be more than twenty days from the close of the hearing.
> 5. Amend Section 102.60 to give the hearing officer greater latitude in fixing the time for filing briefs in representation cases.

The House voted to adopt the resolution.

In reply to a question of A. L. Merrill, of Idaho, Mr. Loomis said the words "representative capacity" in paragraph 3 meant as an attorney ordinarily appears for a client.

The remaining two resolutions of the Section were adopted without debate. They are as follows:

> RESOLVED, That the American Bar Association recommends that the Na-

tional Labor Relations Board exercise its powers and functions under Section 5(d) of the Administrative Procedure Act with respect to declaratory orders.

RESOLVED, That the National Labor Relations Board should be requested to make arrangements to furnish attorneys copies of all final decisions, opinions and orders, together with the names of counsel, immediately upon rendition.

The House then recessed at 5:35 o'clock.

■ At the third session of the Midyear Meeting, the House of Delegates gave its approval to holding a portion of the 1957 Annual Meeting in England, and considered a proposal by the Section of Criminal Law to take part in a joint study of narcotics and the narcotics control problem in connection with the American Medical Association.

Third Session

■ The House convened for its final session of the 1955 Midyear Meeting at 10:15 on the morning of February 22. Chairman Randall presided.

Speaking for the Committee on Public Relations, Richard P. Tinkham, of Indiana, the Committee Chairman, said that the Committee was now in the process of filming a movie on the Association, designed for showing to both lawyers and lay groups. "It is an attempt to tell the story of the organized Bar in a film which will be about twenty-five or twenty-seven minutes long." Mr. Tinkham said that the film would be completed in March and the Committee hopes to have enough copies of it to keep it in circulation at all times.

Reporting for the Board of Governors, Secretary Stecher announced that the subject selected for the 1956 Ross Essay Contest is "The Self-Incrimination Clause of the Fifth Amendment: Its Interpretation, Use and Misuse".

Before asking for approval of the report, he stated there was one item which he desired to present to the House for specific approval—the recommendation of the Board that the invitation received sometime ago from the Law Society of England and the General Council of the Bar to hold an Annual Meeting in London, be accepted. He directed attention to the fact that under Article III of the Constitution of the Association, the Board of Governors is authorized to designate the time and place of the Annual Meeting, but reported the view of the Board that any meeting outside of the United States should receive the approval of the House of Delegates. He further informed the House that an invitation had been received for 1957 from The Association of the Bar of the City of New York and the New York County Lawyers Association to hold part or all of the 1957 Annual Meeting in New York City and, therefore, recommended on behalf of the Board that part of the 1957 Annual Meeting be held in New York City and that the meeting then be recessed to London, England, to be completed there. Although the dates have not been definitely fixed, he reported that the London portion of the meeting would be held during the week of July 21, 1957. Without debate the House voted to approve the Board's recommendation.

The Secretary then directed attention to certain amendments to the By-laws of the Section of Municipal Law which had been approved by the Board at its October meeting, but which had inadvertently been omitted from the Calendar. These amendments, which added a second Vice Chairman, provided for an editor of Section publications and made the Section Delegate a member of the Section Council, were approved by the House.

The remainder of the Board's report involved matters within the administrative authority of the Board under the Constitution and By-laws of the Association. Particularly pointed out by the Secretary were the authorization given the Special Committee on Communist Tactics, Strategy and Objectives to file a brief as *amicus curiae* on behalf of the Association, in opposition to the appeal of Leo Sheiner from an order of the Florida Circuit Court disbarring him from practice because of his refusal to say whether he was a Communist; the modification of the regulation adopted by the Board regarding remission of dues of members of the Association in military service; the approval of the group life insurance plan for members of the Association to be written by The New York Life Insurance Company, and the announcement that the 1956 Midyear Meeting will be held at the Edgewater Beach Hotel in Chicago, on February 20 and 21, 1956. The House voted to approve the remainder of the report.

Mr. Seymour, of New York, then moved adoption of the following resolutions proposed by the Council of the Section of Legal Education and Admissions to the Bar:

I.

WHEREAS, the Florida A. and M. University College of Law of Tallahassee, Florida, has applied for approval and an inspection shows that the school complies with the Standards of the American Bar Association for Legal Education.

THEREFORE, BE IT RESOLVED, That the American Bar Association grants provisional approval to the Florida A. and M. University College of Law of Tallahassee, Florida, subject to annual inspection at the expense of the school until full approval be given.

II.

WHEREAS, the Army Judge Advocate General's School at the University of Virginia has applied for approval and an inspection shows that the school complies with the Standards of the American Bar Association for Legal Education.

THEREFORE, BE IT RESOLVED, That the American Bar Association grants provisional approval to the Army Judge Advocate General's School (graduate program) at the University of Virginia, subject to annual inspection at the expense of the school until full approval be given.

The resolutions were adopted without debate.

The next item of business was the report of the Section of Criminal Law, given by Walter P. Armstrong, Jr., of Tennessee, the Section Chair-

man. Mr. Armstrong had four resolutions to present to the House, the first of which was as follows:

> RESOLVED, That the American Bar Association, having heretofore approved and recommended the passage of H.R. 7311 and S. 3542 in the 83d Congress, which bill has now been introduced in the 84th Congress as H.R. 789, dealing with proposed measures to suppress the transmission of certain gambling information in interstate commerce, now recommends and approves the amendment of said bill by the inclusion therein of a provision requiring regulated communications carriers to comply with the orders of law-enforcement agencies, and conferring immunity from liability for such compliance, substantially as follows:
>
> When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a federal, state or local law enforcement agency, acting within its jurisdiction, *which notice is approved by a court of competent jurisdiction as in* ex parte *proceedings for the issuance of a search warrant,* that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce, it shall discontinue within a reasonable time, or refuse, the leasing, furnishing or maintaining of such facility, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any such notice. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a federal court or in a state or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.
>
> FURTHER RESOLVED, That the Section of Criminal Law be, and it is hereby, authorized to support and obtain the amendment of said act by all appropriate means.

Mr. Armstrong explained that the purpose of the proposal was to require telephone and telegraph companies and other carriers to remove facilities from establishments where the utilities are being used to transmit gambling information. The bills would also prevent any liability being imposed upon the utility when it complies with an order of a duly authorized law enforcement agency.

Mr. Benjamin, of New York, speaking for the Section of Administrative Law, said that the Council of his Section had discussed these proposals and had decided not to oppose the resolution or ask for referral to the Administrative Law Section. He did, however, propose an amendment to the resolution by adding a clause (printed in italics above) to require a court order before any utility could be removed. Either a state or a federal court would have jurisdiction, Mr. Benjamin said, in reply to a question.

Mr. Armstrong opposed the amendment on the ground that the original language of the resolution has already been embodied in a bill now pending before Congress, and therefore approval of the amended resolution would in effect be disapproval of the bill. The original language meets the needs, he declared, and Mr. Benjamin's proposal would only slow down the process of putting a stop to the use of the utilities for illegal purposes.

Mr. Benjamin said that his Section was trying to protect victims of a mistake on the part of law enforcement officials.

The House voted 85 to 47 in favor of the amendment, and then adopted the resolution as so amended.

The second resolution of the Criminal Law Section urged the Congress to enact legislation empowering the Supreme Court and the Courts of Appeals to review sentences imposed by federal courts in criminal cases. Mr. Armstrong said that legislation to accomplish this would soon be introduced in the Congress.

H. Cecil Kilpatrick, of the District of Columbia, raised a point of order. The rules of the House require that when a Section recommends legislation, it supply the House with a copy of the bill, he said.

Mr. Armstrong said that no legislation had yet been introduced. The Chair sustained the point of order, however, and Mr. Armstrong withdrew clause 2 of his resolution, which would have authorized the Section to obtain the enactment "by all appropriate means". This left the resolution as merely a statement favoring the principle of appellate review of sentences.

Secretary Stecher, for the Board of Governors, moved that the subject be referred to the Committee on the Administration of Criminal Justice, headed by General Donovan.

Mr. Armstrong said that such a referral would, in effect, bury the proposal. It would be only a tiny part of the over-all study now being made by the Donovan Committee. He also pointed out that the Committee will not finish its work for five years, and, under the terms of the Ford Grant, it is prohibited from taking any part in the passage of specific legislation.

On motion of Cuthbert S. Baldwin of Louisiana, the resolution was referred back to the Section for further consideration and report.

The third resolution of the Section dealt with the problem of narcotic drug traffic and proposed a

study of the problem with the American Medical Association.

On behalf of the Board of Governors, Secretary Stecher moved that the entire resolution be referred to the American Bar Foundation. He called the attention of the House to its adopted policy of referring all recommendations involving research to the Foundation.

Mr. Armstrong then asked to have the three clauses of the resolution considered separately. The second clause, he explained, which proposed an investigation "through the American Bar Foundation [of] the availability of funds from sources outside the Association" to conduct such a study, it was highly appropriate to refer to the Foundation. The first clause, however, merely authorized the Section to get in touch with representatives of the American Medical Association to discuss such a study. Such a meeting has been arranged, he said, and he wanted approval of the principle by the House of Delegates.

Secretary Stecher, speaking on the first clause, said that any Section or Committee has authority to explore a subject within its jurisdiction without action by the House.

Mr. Armstrong said he still thought the endorsement of the House would be useful.

Mr. Seymour, of New York, proposed to amend Mr. Stecher's motion by referring the resolution to the Foundation for study "without prejudice to preliminary explorations as suggested by the Section". This motion was carried.

The House then voted on the motion by Mr. Stecher to refer, as amended by Mr. Seymour's proposal. This resulted in a tie vote, 72 to 72, and the deadlock was resolved by the Chairman in favor of the referral.

The second clause of the resolution was also referred to the Foundation, with the consent of the Committee.

The third clause of the resolution was as follows:

> To urge the Congress of the United States to undertake a re-examination of the Harrison Act, its amendments, and related enforcement and treatment policies and problems.

Judge Thompson, of Illinois, urged the House not to refer this clause of the resolution, but declared that he was opposed to the resolution.

The Problem of Narcotics . . . *It Requires Immediate Action*

Arthur J. Freund, of Missouri, the Delegate of the Section, said that this was not a matter for reference. "The problem of narcotics and the dealing with narcotics is one of the really serious problems of our times. It requires action, and immediate action."

Vincent B. Welch, of the District of Columbia, moved that the clause be referred back to the Section for study and a specific proposal.

Julius Applebaum, of New York, said he was against that. "The Section has studied the problem. It has made a very serious and constructive proposal. . . . I think it behooves this Association to ask Congress not to wait for any survey by the Foundation, but itself to set up a study and to get a remedy that will solve this problem as soon as possible."

In reply to a question, Mr. Armstrong said that he thought that a reference back to the Section was neither necessary nor required. The Harrison Act has been in effect for forty years without any over-all revision or re-evaluation. The Section has been studying it for two years, and now urges this action, he declared.

Francis W. Hill, of the District of Columbia, declared that the Section should do more than it has. "We are in the dark as to what features they do wish to be studied, what recommendations would probably be made, and it seems to me the Section should make a study and report to us the defects that they believe to exist in this act."

Franklin Riter, of Utah, declared that the Harrison Act is archaic. ". . . the time has come . . . to urge Congress to reconsider it and start its own study on reconstructing the Harrison Act in view of modern conditions."

James R. Morford, of Delaware, declared that it is "the purpose of the American Bar Association and of the Section of Criminal Law to make definitive recommendations having to do with the improvement of the administration of criminal justice. This is like passing a resolution against sin. . . . We should assume leadership . . . and not merely pass a resolution, which is really meaningless, asking Congress to re-examine an Act."

A vote was then taken, and the members were 52 for and 106 against referral.

The question then reverted to the third clause of the resolution.

Blakey Helm, of Kentucky, declared that there was no reason why we should not call upon Congress to make an investigation of the Act. The Board of Governors' purpose in its original recommendation had been fully carried out, he said, by the referral of the two preceding clauses.

Hatton W. Sumners, of Texas, declared "we can't afford not to vote for the resolution in the House as it stands".

The House then voted, and the resolution was adopted.

The fourth and last resolution of the Criminal Law Section called for appointment of a special committee on juvenile delinquency.

The Board of Governors had recommended that this resolution be deferred pending consideration of the creation of a Section of Family Law.

Mr. Armstrong withdrew the resolution in view of the Board's recommendation.

The report of the Committee on Communist Tactics, Strategy and Objectives, was delivered by its Chairman, former Senator Herbert R. O'Conor, of Maryland. Senator O'Conor said that the Committee had called the attention of state bar associations to several cases in which lawyers had refused to testify as to Communist affiliations on the

ground of possible self-incrimination. In Florida, the Committee filed a brief as *amicus curiae* at the invitation of the Attorney General of that state in a case involving such a lawyer. The case is still pending, Mr. O'Conor said, but it is believed that if the Supreme Court of Florida upholds the Association's position that such members of the Bar are unfit to retain their licenses, then other bar associations will be in a position to take action against attorneys in their jurisdictions.

Whitney North Seymour, of New York, Chairman of the Committee on Individual Rights as Affected by National Security, made a progress report on the work of his Committee. He said that various proposals for changes in the rules of congressional investigating committees have been introduced, one of which precisely parallels the recommendations of the Association made at the Chicago Annual Meeting. Mr. Seymour said that he was hopeful that something would be done to improve investigative procedures during this session of Congress.

C. Baxter Jones, Jr., delivering the report of the Junior Bar Conference, proposed the following:

> RESOLVED, That the House of Delegates of the American Bar Association, in the interest of making the public aware of the careful preparation and training required of the law student facing admission to practice before the Bar, hereby endorses the week of August 21 through 27, 1955, as American Law Student Week.

The resolution was adopted.

On motion of William B. Cudlip, of Michigan, the House then voted to rescind its action taken at the Second Session, disapproving the recommendation of the Committee on Jurisprudence and Law Reform, on a constitutional amendment to permit the states to propose amendments without action by Congress. The vote in favor of rescission was 83 to 56, and the proposal was recommitted to the Committee on Jurisprudence and Law Reform.

E. Smythe Gambrell, of Georgia, Chairman of the Committee on Regional Meetings, reported briefly on regional meetings scheduled for the near future. One of the finest features of these meetings, Mr. Gambrell said, is that they "give us an opportunity to keep in harness many great leaders, local and state".

The report of the Committee on Amendment of Rule 71-A, given by John C. Satterfield, of Mississippi, stated that legislation to amend Rule 71-A had been passed by the Senate but died in the House in the 83d Congress. It has been reintroduced in the present Congress.

The report of the Committee on Peace and Law Through United Nations was given by Alfred J. Schweppe, of Washington. The Committee had no recommendations, but Mr. Schweppe reported that there was pronounced activity in Congress on treaties and executive agreements in spite of last year's adverse Senate vote on the Bricker Amendment.

Paul W. Updegraff, of Oklahoma, Chairman of the Committee on Investigation, Solicitation and Handling of Personal Injury Claims, said that his Committee had just completed an all-day meeting devoted to study of the problem under its jurisdiction and was planning to hold several more such meetings. Several states have passed anti-solicitation statutes, he said.

Charles S. Rhyne, of the District of Columbia, Chairman of the Committee on Rules and Calendar, reported on a proposed change in the by-laws of the Association which would change the method of electing members. The proposal would abolish the present Committees on Admission, provide that endorsement by a member of the Association on an application constitute nomination for membership, and leave it up to the Board of Governors to determine what other information should be obtained from an applicant and what sort of inquiry should be made regarding his qualifications. Mr. Rhyne characterized the proposal as a "step toward universal membership by all who are in good standing" in the Bars of the various states.

Upon his motion, the House voted to approve in principle the language of the draft version of the new By-law. Any amendment of the By-laws of the Association must have the approval of both the Assembly and the House of Delegates after due notice is given to the membership by publication in the JOURNAL. The House action, therefore, does not effect an amendment.

Various suggestions were offered from the floor for consideration by the Committee in drafting the final form of the proposed change, and Mr. Rhyne said that the Committee would like to have other suggestions on this important matter.

The meeting adjourned *sine die* at 12:40 in the afternoon.

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